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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

FRANK X. HOPKINS,
Warden of the Nebraska State Penitentiary,

Petitioner,

v.

JOHN BYRON NEWMAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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THIS IS NOT A CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Eighth Circuit Court of Appeals opinion misconstrues the nature and meaning of "clearly established federal law, as determined by the Supreme Court of the United States" to the extent that it wrongly granted habeas corpus relief to a state prisoner under 28 U.S.C. § 2254(d)(1).

II.

Whether the Eighth Circuit Court of Appeals continued use of the standard of review for harmless constitutional error established in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) in certain § 2254 cases violates this Court's ruling in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) and whether it creates an intolerable split of authority among the circuit courts.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit overturning the district court's denial of habeas corpus relief is reported at 192 F.3d 1132 (8th Cir. 1999), and is included in the Appendix at App. 1-10. The November 22, 1999 decision not to grant rehearing and rehearing en banc does not appear to be reported, but is included in the Appendix at App. 60. The district court's order denying the petition for writ of habeas corpus is reported at 6 F. Supp.2d 1111 (D. Nebr. 1998) and is included in the Appendix at App. 49-55.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit filed its opinion September 29, 1999. App. 1-10. The motion for rehearing and rehearing en banc was denied by the court on November 22, 1999. App. 60. Under Supreme Court Rule 13.1, the petition for writ of certiorari is required to be filed by petitioner within 90 days of the denial of the motion for rehearing en banc. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 2254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

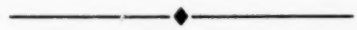
Constitution of the United States, Fifth Amendment.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, Fourteenth Amendment, Section 1.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Constitution of the United States, Sixth Amendment.



STATEMENT OF THE CASE

Trial Testimony

Newman was convicted of first degree sexual assault, a violation of Neb.Rev.Stat. § 28-319, a Class II felony, with enhanced penalties for second and subsequent offenses to which Newman was subject by virtue of his past record. The evidence at trial showed that Newman forced his way into the victim's apartment in the early morning hours of March 21, 1993, and raped her while her 3 year old son slept nearby. He sexually assaulted her in the living room, then carried her into the bedroom and repeated his sexual assault on her there. After the assault, she called the Lincoln Police Department from a telephone to which Newman had not cut the cord. Police arrived shortly after her call, and she described her assailant as an Hispanic male between 5 feet 6 inches and 5 feet 8 inches, olive complexion, dark brown or black hair and mustache, wearing a white T shirt and black pants and black leather jacket. She also told police she thought she noticed a slight Hispanic accent, based on the way he pronounced some words. She assisted the police in creating a computerized composite drawing of the assailant, but was not very happy with the result. She was shown a set of six photographs and was asked if she saw her assailant there. She looked them over, and told police her attacker was not portrayed in those photos.

A couple of days after the assault, police assembled a second photographic array, and showed the photos to the victim. Again she did not see him in that set of photographs. On March 25, 1993 police brought a third set of photos to the victim to look at, and she immediately

knew who it was, and pointed to photograph number 4, which portrayed John Byron Newman.

Subsequently, police learned that Newman had taken an Amtrak train to Las Vegas, and they contacted the Las Vegas police, who arrested Newman on March 26, 1993 pursuant to a fugitive warrant issued by the Nebraska courts. On April 8, 1993 a deputy sheriff flew to Las Vegas to get Newman and bring him back to Lincoln, Nebraska to stand trial. The deputy testified at trial that he thought Newman had a bit of an Hispanic accent. Two other witnesses testified at trial that the day after the victim was assaulted, they saw a person they later identified by a photo lineup as Newman behaving in a singular manner.

Russell Grady testified that at about 12:15 a.m. on March 22, 1993 , he saw a man following a woman about a quarter of a block behind him. Grady testified that this man was dark, and was wearing a black leather jacket and white tennis shoes. Grady saw him follow the woman to the doors of an apartment, and run up to the doors and look in, then walk back to the sidewalk and stand looking at the apartment. A light came on in the top corner apartment, and Newman then walked away. Grady later picked Newman's photo out of a photographic array as the man he saw stalking the woman

Julie Denny testified that she too saw Newman on March 22, 1993. She arrived home at about 10:15 p.m. and, because she thought she had heard something dragging under her car, looked under it in the driveway of her apartment. When she stood up, Newman was standing behind her. He was wearing a black leather jacket, and

white tennis shoes. He began asking her if she knew a certain couple who purportedly lived in the apartment, followed her to a set of stairs and asked her if she was married or had a boyfriend. Julie quickly went up the stairs into her apartment, and reported her encounter the next day to the police. Several days later, she was shown a set of photographs and she picked out Newman as the man who had accosted her. She testified that she did not notice any accent when he spoke to her.

Despite the fact that the victim and witnesses who had seen Newman on either March 21 or March 22, 1993 identified him from a photographic array shown them by the police, the Eighth Circuit Court of Appeals found that "whether Newman has a [sic] Hispanic accent was an important factor in determining whether he fit the description of the attacker." App.9.

At the close of the state's case, Newman sought to introduce a "voice exemplar" by reading a "fairly neutral" statement to show that he did not have an Hispanic accent. The state objected on the basis that it would be impossible to recreate the conditions under which he spoke the word to the victim. The district court sustained the objection, and held that Newman could testify in any voice he chose, but that he would be under oath and subject to cross examination. Without making an offer of proof, Newman rested without presenting evidence.

State Court Direct Appeal

The Nebraska Court of Appeals affirmed Newman's conviction, and held that a defendant has a constitutional right to give a voice exemplar without being subject to

cross examination because such an exemplar is more akin to an identifying physical characteristic than testimonial evidence, and as such, he was not required to waive his Fifth Amendment privilege against self incrimination. See, *State v. Newman*, 4 Neb.App. 265, 541 N.W.2d 662 (1995).

Newman filed a petition for further review pursuant to Nebraska Supreme Court and Court of Appeals Rule of Practice and Procedure 2 F and further review was granted by the Nebraska Supreme Court. It agreed with the Court of Appeals analysis of the voice exemplar issue, and concluded "if relevant and reliable, a voice exemplar may be offered into evidence by a criminal defendant without waiving his or her Fifth Amendment privilege and subject him to cross-examination." *State v. Newman*, 250 Neb. 226, 244, 548 N.W.2d 739, 752 (1996). The court found that although it was error to require Newman to waive his Fifth Amendment privileges if he read a statement, since he had offered nothing to show that his voice exemplar would be sufficiently reliable to be entered as evidence, then there was no trial error in refusing to permit the exemplar. In so doing, the court cited with approval the rulings of *People v. Scarola*, 71 N.Y.2d 769, 525 N.E.2d 728 (1988) and *U.S. v. Esdaille*, 769 F.2d 104 (2nd Cir. 1985), *cert. denied*, 474 U.S. 923, 106 S.Ct. 258, 88 L.Ed.2d 264 (1987) which places voice exemplars in a different category than other routinely admitted evidence because voice exemplars and accents are so easy to fake. The Nebraska Supreme Court concluded that because Newman made no attempt to satisfy the state court requirement that the exemplar be genuine, the trial court properly excluded it. App. 30-34.

Federal Habeas Corpus

On December 11, 1996, Newman filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the District Court for the District of Nebraska. He claimed, among other things, that his due process rights were violated when the trial court refused to permit him to demonstrate his speaking voice without first waving his Fifth Amendment privilege against self incrimination, and subjecting him to cross examination.

The magistrate's report and recommendation found that Newman's complaint was not based on a constitutional right, but was simply a ruling grounded in state law, and that federal habeas courts may not examine such errors unless they are so egregious as to have fatally infected the trial and render it fundamentally unfair. App. 43-45. It stated that the Nebraska Supreme Court is the final arbiter of state law, including the Nebraska rules of evidence, and neither the rule as pronounced by the Nebraska Supreme Court, nor the application of it to Newman was shown to have met this test. The magistrate noted that the state supreme court noted that there was other evidence which "clearly pointed to the petitioner; the use of his voice exemplar in the "accent/no-accent" conflict among the other witnesses would not likely have changed the outcome of the trial in any respect" and certainly did not render the outcome fundamentally unfair. The magistrate recommended denial of the petition in all respects. App. 48.

On April 27, 1998, the district court adopted in all respects the magistrate's report and recommendation, and denied Newman habeas corpus relief. App. 49-56.

Newman filed a motion for a certificate of appealability on May 26, 1998 which was denied by the district court on May 29, 1998 as he had not made a substantial showing of a denial of any constitutional right. App. 57. On September 9, 1998 the Circuit Court directed that the certificate of appealability issue on two questions: Whether the admission of evidence obtained in violation of the Fourth Amendment constituted harmless error, and whether the refusal to allow Newman to offer his voice exemplar was a denial of any right under the United States Constitution. App. 58.

Eighth Circuit Court of Appeals

The United States Court of Appeals for the Eighth Circuit overruled the order of the district court denying habeas corpus relief on September 29, 1999. It held that the United States Supreme Court's "decision in *Wardius* of a defendant's reciprocal right of discovery, when read in light of the Court's reference to *Washington v. Texas*, see, 412 U.S. at 474 n. 6, reflects an expression of clearly established federal law that a defendant is entitled to introduce a voice exemplar without waiving his Fifth Amendment privilege against self-incrimination." *Newman v. Hopkins*, 192 F.3d 1132, 1135 (8th Cir. 1999).

The court also determined that, under the *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) harmless constitutional error analysis, the refusal to permit Newman to offer his voice exemplar without waiving his Fifth Amendment privileges was not harmless error

because that appeared to be the only defense he had.[1] App. 1-10. Hopkins' motion for rehearing and rehearing en banc was denied on November 22, 1999. App. 60. This petition follows.

ARGUMENT

I.

THE CIRCUIT COURT'S CONCLUSION THAT THE NEBRASKA SUPREME COURT'S FAILURE TO REMEDY THE DENIAL OF NEWMAN'S RIGHT TO PRESENT HIS VOICE EXEMPLAR RESULTED IN A DECISION THAT IS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW AS DETERMINED BY THIS COURT GROSSLY MISCONSTRUES THE NATURE OF "CLEARLY ESTABLISHED FEDERAL LAW" AS DEFINED BY 28 U.S.C. § 2254(d)(1).

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application

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[1] The Eighth Circuit Court of Appeals utilizes the *Chapman* standard rather than the proper *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) standard when state courts have not reviewed the claim for harmless constitutional error.

See, *Orndorff v. Lockhart*, 998 F.2d 1426 (8th Cir. 1993), *cert. denied*, 511 U.S. 1060, 114 S.Ct. 1631, 128 L.Ed.2d 354 (1994).

> of, clearly established Federal law as determined by the Supreme Court of the United States; . . .

28 U.S.C. § 2254(d)(1).

We begin by assuming that the circuit court's decision was based on the theory that the resolution reached by the Nebraska Supreme Court was contrary to clearly established federal law as determined by this Court. We must so assume, as the circuit court opinion does not inform us under which of the prongs of § 2254(d)(1) it is granting relief. By virtue of the fact that the circuit court's opinion states that the Nebraska Supreme Court's opinion "resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent", *Newman v. Hopkins*, 192 F.3d at 1136, we conclude that the circuit court is finding that the Nebraska Supreme Court's decision is contrary to clearly established federal law, and not that it is an unreasonable application of that law. App. 7.

With that as a foundation, it cannot seriously be argued that utilizing a case regarding a defendant's right of pretrial discovery, and blending into that a footnote which references yet another case, neither of which concern voice exemplars and their admissibility at trial, creates any sort of "clearly established federal law" sufficient to sustain a grant of habeas corpus relief. The Circuit Court does **not** hold, significantly we think, that a combination of *Dionisio*, *Wade* and *Wardius* clearly establishes the federal law on this point. Rather, the circuit court states that these cases "reflect an expression of clearly established federal law." App. 6. This is simply not what the statutory standard is.

It does not appear at this point in time that there is any uniformly accepted definition of what Congress meant by a decision contrary to clearly established federal law. There appears to be some consensus, however, that a decision that is "contrary to" precedent as established by this Court must apply only to purely legal questions or the application of law to facts indistinguishable in any material way from those on the basis of which the precedent was decided, and that decision reaches a legal conclusion irreconcilably opposite to that reached in the precedent set by this Court. *See, e.g.* , *Green v. French* 143 F.3d 865 (4th Cir. 1998). The *Green* court determined that the only logical way to apply the standard is to determine if the state court decision is in square conflict with precedent set by this Court. If it is, then the writ should issue. If no such controlling precedent exists, then the writ should issue only if the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant Supreme Court precedents, or if the decision rests upon an objectively unreasonable application of established principles to new facts.,

In a similar, but not identical vein, the First Circuit in *O'Brien v. Dubois*, 145 F.3d 16 (1st Cir. 1998) approaches the question thus: The federal habeas court must ask whether this Court has prescribed a rule that governs the petitioner's claim. If there does exist governing precedent from this Court, then the district court must determine whether the state court decision is "contrary to" that governing rule. If there is no existing precedent, then the

"contrary to" language simply disappears, and the district court must determine whether the state court's resolution of the issue involved an unreasonable application of Supreme Court precedent.

To determine how specific the rule must be to qualify as precedent for this portion of 28 U.S.C. § 2254(d)(1), the *O'Brien* court looked to *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) and determined that something more than articulation of a general standard that covers the claim is necessary. In order to find that relief is merited, the habeas petitioner must show that the precedent of this Court **requires** an outcome in direct conflict with the conclusion reached by the state courts. *O'Brien*, 145 F.3d at 24-25.

If no ruling of this Court can fairly be said to require a particular outcome in a case, *O'Brien* held that the state court ruling must be evaluated to ascertain whether it involved an "unreasonable application" of clearly established federal law, as determined by this Court. *O'Brien* utilizes an approach in which the decisions of other inferior federal courts may be used to determine the reasonableness of the state court decision, but notes that other courts disagree with this method of analysis.[2]

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[2] The *O'Brien* court notes that the Sixth Circuit in *Herbert v. Billy*, 160 F.3d 1131 (6th Cir. 1998) disapproves of this approach, noting that the language of the statute directs the district courts to determine whether the state court ruling was an unreasonable application of clearly established federal law *as determined by the Supreme Court of the United States*. [emphasis supplied]. The Sixth Circuit therefore rejects the approach that other district court and circuit court opinions are of value in determining whether the state court's decision is an unreasonable application of federal law.

The Fifth Circuit has held that the "contrary to" language applies only to mixed questions of law and fact. *See, Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996). The *Drinkard* court determined that the "contrary to" language meant that the district court must determine if the state court decision rested on a legal determination that was contrary to clearly established federal law as established by this Court. Thus the standard of review will vary with the nature of the question presented the court in the habeas petition.

The Eleventh Circuit Court of Appeals envisions two situations in which there might be a state court resolution of issues that would be "contrary to" clearly established federal law. *Neelley v. Nagle*, 138 F.3d 917 (11th Cir. 1998). The first is when a state court is presented with facts essentially the same as a set of facts in a given case resolved by this Court, but the state court reaches a different legal conclusion based on those facts. This cannot be the nature of the situation we face now, as this court has never yet issued a ruling on the admissibility of voice exemplars, and the constitutionality of requiring a Fifth Amendment waiver.

The second situation in which a state court decision would be contrary to clearly established federal law would be one in which a state court simply did not apply the correct legal principles to decide a case. The error is thus a question of pure law. It appears this would be the category into which the Eighth Circuit opinion in *Newman* would fall, as the court appears to believe there exists "clearly established federal law" as determined by this court that should have governed resolution of this case at the state level. It appears that the Eighth Circuit Court of

Appeals stands alone in this interpretation of "clearly established federal law."

We can find no other jurisdiction which holds that application of pretrial reciprocal discovery rights, when mixed with a footnote referencing a case dealing with the right of compulsory process for obtaining witnesses in his favor creates a constitutional right to offer a voice exemplar to demonstrate that the defendant does not speak with an accent. There is assuredly no case from this Court which so holds. It is therefore apparent that the Eighth Circuit Court of Appeals was manifestly wrong when it found that there existed some clearly established federal law as determined by this Court. Since there is no such clearly established law, the determination that the resolution of the case by the Nebraska Supreme Court violated the federal constitution must also fall. If relief may only be granted for violations of clearly established federal law, and there is no such law, then there is no basis on which relief can be granted, and the Circuit Court's decision is in clear violation of 28 U.S.C. § 2254(d)(1).

Furthermore, we note that the Eighth Circuit also violated the rule established by this Court in *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). Under *Estelle*, federal habeas courts are not permitted to grant relief for errors of state law. While the Circuit Court held that this Court in *Wardius* created a constitutional right to offer a voice exemplar without waiving the Fifth Amendment privilege against self incrimination, it noted that the Nebraska Supreme Court held that, as a matter of **state evidentiary law**, the exemplar was properly excluded because Newman "made no offer to establish the genuineness of the exemplar, it

[was] properly excluded as irrelevant." *State v. Newman*, 250 Neb. 226, 245, 548 N.W.2d 739, 752 (1996). In short, the Nebraska Supreme Court found the trial court properly excluded the exemplar because Newman had not satisfied the state court admissibility requirements for such evidence. We know of no rule that constitutionally requires admission of any sort of evidence that has not met the state court's requirements for admission. Admission of all evidence is governed by the rules of evidence, and the fact that a person cannot constitutionally be barred from offering certain evidence is a far cry from mandating that it be admitted, regardless of any other deficiency from which it may suffer.

The Circuit Court cited *Rock v. Arkansas* 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) for the proposition that a state may not per se exclude evidence that would impermissibly impact a defendant's right to testify on his behalf. *Rock* is largely inapplicable to this case because the infirmity found in *Rock* was the absolute statutory prohibition against hypnotically refreshed testimony by a defendant. Here, the Circuit Court erroneously found that the Nebraska Supreme Court ruled that the exemplar was inadmissible because the conditions under which Newman spoke the words to the victim could not be reproduced. *Newman v. Hopkins*, 192 F.3d at 1136. The Circuit Court reasoned that once the trial court ruled that Newman would have to waive the Fifth Amendment privilege against self incrimination, "there would have been no point in Newman's attempting to make such a showing in the face of that ruling." *Newman v. Hopkins*, 192 F.3d at 1136. We observe that the point in making a record at trial of the exemplar would be to make a record

upon which the issue might have been resolved. An offer of proof, which was not made or even requested at trial, would have done much to preserve the issue for appeal.

The ruling of the Nebraska Supreme Court is simply not as the Circuit Court said it is. The Nebraska Supreme Court did not hold that the reason the exemplar should be excluded was because the conditions under which the words were spoken could not be reproduced. That was the holding of the trial court, and that holding was found to be error by the State Supreme Court. The Nebraska Supreme Court found the exemplar was properly excluded because Newman made no attempt to show that it was reliable. The Circuit Court chose to interpret this as the same sort of perpetual prohibition that this Court found unconstitutional in *Rock*, but the two are clearly distinguishable.

Everyone is in agreement that the trial court erred in finding that Newman must waive his Fifth Amendment privilege in order to offer his voice exemplar. However, the Nebraska Supreme Court found that because Newman did not satisfy the state court admissibility requirements for admission of such exemplar, then it was properly admitted. The Circuit Court, utterly misreading the Nebraska Supreme Court ruling, converts this into a constitutional infringement of the right to testify on one's behalf. Even *Rock* does not go so far as to require admission of evidence because it is all the defendant may have to offer in his defense.[3]

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[3] " . . . the accused, as is required of the State, must comply with established rules of procedure and evidence designed to

The long and short of it is that the Eighth Circuit Court of Appeals has created a constitutional right that does not exist. This Court has never held that there exists a constitutional right to offer a voice exemplar, either with or without waiving the Fifth Amendment privileges. There is no "clearly established federal law, as determined by the Supreme Court of the United States" that so holds, and thus no basis upon which the Circuit Court could have concluded that the Nebraska Supreme Court erred in not granting Newman relief for the trial court's error in refusing to permit him to offer his voice exemplar.

II.

THE EIGHTH CIRCUIT ALONE APPLIES THE STANDARD OF REVIEW FOUND IN *CHAPMAN V. CALIFORNIA* IN SITUATIONS IN WHICH A STATE COURT HAS NOT PERFORMED A CONSTITUTIONAL HARMLESS ERROR ANALYSIS. THIS IS CLEARLY CONTRARY TO THIS COURT'S RULING IN *BRECHT V. ABRAHAMSON*.

The Circuit Court in *Newman* performed a harmless constitutional error analysis, but did not utilize the standard enunciated by this Court in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). The Eighth Circuit, alone among the federal circuits, maintains there is still life left in the standard of review established in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), even though the Circuit Court is performing a collateral review of a state court conviction. The Eighth Circuit continues to apply *Chapman* in

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assure both fairness and reliability in the ascertainment of guilt and innocence." *Rock v. Arkansas*, 483 U.S. 44, 55, n. 11.

cases in which the state courts have not undertaken a harmless constitutional error analysis.[4]

The Circuit Court's reasoning is found in *Orndorff v. Lockhart*, 998 F.2d 1426 (8th Cir. 1993), *cert. denied*, 511 U.S. 1060, 114 S.Ct. 1631, 128 L.Ed.2d 354 (1994). It asserted that since the state and federal courts which had thus far reviewed the case had all undertaken a harmless constitutional error review, and since this Court in *Brecht* held that it did not seem logical to require a federal court to engage in the same approach to harmless error analysis that *Chapman* required the state courts to engage in on direct review, then the federal courts are to review the issue under the less stringent *Kotteakos* harmless error standard. *Orndorff*, 998 F.2d at 1430. But if the state courts have not had the opportunity to review the error at all, and the federal habeas court is the first to review a claim of constitutional error, then it should be the court to apply the more stringent standard, even if it is acting in a collateral review capacity. *Orndorff*, 998 F.2d at 1430.

This rationale has been roundly rejected by every other circuit court which has had the opportunity to consider whether the *Orndorff* approach is correct or if

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[4] *Chapman* requires that "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. The *Brecht* standard, on the other hand, is remarkably more lenient in assessing the impact of the purported constitutional violation: the constitutional error warrants habeas corpus relief only if the constitutional error "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623.

Brecht is the standard regardless whether the state has reviewed the issue.[5]

The Eighth Circuit Court of Appeals appears to be well entrenched in its refusal to reconsider its position that a *Chapman* analysis still maintains some viability, even in the face of *Brecht*. The Motion for Rehearing and Rehearing En Banc squarely presented the issue whether maintaining the *Chapman* analysis was sound policy, and while there were those judges who would have revisited the issue, en banc rehearing was denied, and thus the dual standard remains in place. App. 60.

Brecht itself demonstrates the fallacy of the Circuit Court's rationale. *Brecht* offers nothing that would justify use of the *Chapman* on collateral review. This Court simply did not restrict the application of the standard enunciated in *Brecht* to cases in which a petitioner had already raised the issue to the state courts under *Chapman*. There exists no reason to imply such an exception when *Brecht* does not even hint at such result. The reasoning of the Circuit Court is entirely at odds with the opinion of this Court in *Brecht*. The Circuit Court has set itself up as a "super appellate court" of state court decisions and has abandoned its role as a court of collateral review by continuing to use the *Chapman* "harmless beyond a reasonable doubt" standard in § 2254 cases. We do not dispute that the *Chapman* standard is entirely appropriate for a state court's direct review of its own conviction.

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[5] *Hogue v. Johnson*, 131 F.3d 466 (5th Cir. 1997) offers a listing of those circuits which have considered whether to reinstate *Chapman* or to hold fast to *Brecht*. See, *Hogue* 131 F.3d at 499.

However, as recognized by this Court in *Brecht*, the rationale for a more deferential standard of review in collateral attacks, such as habeas corpus, is appropriate if comity, federalism, and some measure of respect for the finality of state trials is to be realized. *Brecht* itself permits of no reason to believe that *Chapman* plays any role in collateral attacks on a presumptively valid state court conviction. Quite the contrary is clear.

Brecht makes clear that "the costs of applying the *Chapman* standard on federal habeas outweigh the additional deterrent effect, if any, that would be derived from its application on collateral review." *Brecht*, 507 U.S. 619, 636, 113 S.Ct. at 1721. Further, this court noted that granting habeas corpus relief because there is a reasonable possibility that trial error contributed to the verdict is diametrically opposed to the traditional function of habeas corpus – to give relief to those grievously wronged by society. *Id.* This Court concluded that a cost/benefit analysis of applying *Chapman* on collateral review resulted in more costs than benefits, and thus found application of a less onerous standard to be proper in a habeas corpus review of a state court conviction.

The split of authority regarding the proper standard of review appears to be inviolable at this point. The Eighth Circuit is obviously not disposed to reconsider the *Orndorff* rationale, and the rest of the nation's circuit courts have roundly rejected the bifurcated standard of review utilized by the Eighth Circuit. The situation we now face means that the standard of review for harmless constitutional error is dependant on the location of the defendant. The Eighth Circuit uses varying standards of review, depending on whether the state courts have

addressed the issue. The rest of the federal courts, with two exceptions,[6] use an entirely different standard. The granting or denial of habeas corpus relief should not be dependant on the location of the inmate who has filed for relief, and that is the situation we are currently in as a result of the split of authority. This is at best a troublesome situation; at worst, it will grant relief in cases where relief is clearly not warranted, and where relief would have been denied, if the defendant were just across the state line in a different jurisdiction.

Had the Eighth Circuit Court of Appeals applied the correct *Brecht* standard of review to a correct assessment of the facts, then assuming that it would have still found constitutional error, the outcome of the analysis would have been radically different. Had the Circuit Court evaluated the purported constitutional error to determine whether the exclusion of the exemplar "had a substantial and injurious effect or influence in determining the jury's verdict", particularly in light of the Nebraska Supreme Court's finding that the properly admitted evidence amply supported findings that Newman committed the offense in question, the Circuit Court would have been obliged to reach a different conclusion. Had the Circuit Court recognized the record shows very clearly that the presence or absence of an accent was utterly immaterial to the identification of Newman as the rapist, since he

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[6] It appears that two federal district courts are at least partially persuaded of the rightness of the Eighth Circuit's position regarding applicability of *Chapman*. See, *Lyons v. Johnson*, 912 F. Supp. 679, (S.D.N.Y. 1996), *aff'd*, 99 F.3d 499 (2nd Cir. 1996) and *Rickman v. Dutton*, 864 F. Supp. 686 (M.D. Tenn.1994), *aff'd sub nom. Rickman v. Bell*, 131 F.3d (6th Cir. 1997).

was identified by the three main witnesses from a photo array, and had the Circuit Court then applied the proper standard of review, then it is clear the result would have been very different. Grossly mischaracterizing the facts in the record, or at least not reading it carefully enough to understand how Newman was identified, refusing to permit the Nebraska Supreme Court to interpret its own record, and doggedly refusing to apply the appropriate standard of review has led to an intolerable result in this case.

CONCLUSION

The Eighth Circuit Court of Appeals has utterly misconstrued the meaning of "clearly established federal law as determined by the Supreme Court of the United States" and has thereby created a new constitutional right where one did not exist before. There is nothing in the jurisprudence of this Court that would justify the finding that a defendant has a constitutional right to offer a voice exemplar at trial, regardless of the state court requirements for its admissibility. The case law of this Court simply does not create any such constitutional right, and consequently, there can be no decision that is contrary to clearly established federal law.

The Eighth Circuit Court of Appeals has also refused to abide by this Court's decision in *Brecht v. Abrahamson*. It continues to apply a standard of review appropriate only on direct review, and will not reconsider its singular and firmly entrenched position that *Chapman* is the standard of review to be used on collateral review when a

state court has not been presented with the opportunity to consider a claim of constitutional harmless error. Nothing in *Brecht* even hints at such a result, and the Eighth Circuit's intractable position has created a distinct split of authority among the circuit courts. That split must be mended if we are to establish uniform meaning and application of the federal constitution throughout the country.

Respectfully submitted,

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John Byron **NEWMAN**, Appellant,

v.

Frank X. **HOPKINS**, Appellee.

No. 98-2445.

United States Court of Appeals,
Eighth Circuit.
Submitted: April 22, 1999.
Filed: Sept. 29, 1999.

John C. Vanderslice, Lincoln, NE, argued (Jennifer L. Gilg, Omaha, NE, on the brief), for appellant.

Kimberly A. Klein, Lincoln, NE, argued (Don Stenberg, Attorney General, on the brief), for appellee.

Before RICHARD S. ARNOLD and WOLLMAN,[1] Circuit Judges, and WOLLE,[2] District Judge.

WOLLMAN, Chief Judge.

John Byron Newman appeals from the district court's denial of his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. We reverse.

I.

During the early morning hours of March 22, 1993, police officers in Lincoln, Nebraska, responded to an emergency call from the victim of a sexual assault. The victim provided the police with a description of her

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[1] Roger L. Wollman became Chief Judge of the United States Court of Appeals for the Eighth Circuit on April 24, 1999.

[2] The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa, sitting by designation.

attacker, including the facts that he was wearing a black leather jacket and that he spoke with a Hispanic accent. A few days later, the victim identified Newman as her attacker from a photographic array arranged by the police. Newman was subsequently arrested in Las Vegas, Nevada, and extradited to Nebraska to face criminal charges.

Newman's first trial ended in a mistrial when the jury was unable to reach a verdict, but his second trial resulted in a conviction for first-degree sexual assault. *See* Neb.Rev.Stat. § 28-319(1). The state trial court sentenced him to twenty-five to fifty years' imprisonment without parole.

Newman's conviction was affirmed on appeal by the Nebraska Court of Appeals, *see State v. Newman*, 4 Neb.App. 265, 541 N.W.2d 662 (1995), and the Nebraska Supreme Court, *see State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996). He then filed this petition for a writ of habeas corpus.

II.

We granted a certificate of appealability on two issues: (1) whether evidence admitted at Newman's trial was seized in violation of the Fourth Amendment, and (2) whether Newman was denied due process of law when the trial court ruled that he would waive his privilege against self-incrimination and subject himself to cross-examination if he presented a voice exemplar to the jury. In reviewing these issues, we apply a presumption of correctness to the state court findings of fact. *See* 28 U.S.C. § 2254(e)(1). In the circumstances of this case, we

may grant the writ only if the state court's adjudication of the federal constitutional claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* § 2254(d)(1).

A.

On appeal following his conviction, Newman argued that evidence introduced at his trial – a black leather jacket that Las Vegas police officers had taken from one of Newman's suitcases – was seized in violation of the Fourth Amendment. Although the Nebraska Court of Appeals and the Nebraska Supreme Court agreed with Newman that the state trial court had erred in denying his motion to suppress the evidence, both courts held that because the victim gave a detailed description of her attacker's physical characteristics and had identified Newman from a photo in which he was not wearing a black leather jacket, as had two other witnesses, the error in admitting the jacket into evidence was harmless beyond a reasonable doubt. *See Newman*, 541 N.W.2d at 672-73; *Newman*, 548 N.W.2d at 749.

The district court held that Newman's Fourth Amendment claim was barred by *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), in which the Supreme Court held that a state prisoner may not be granted federal habeas relief on a Fourth Amendment claim if the state has provided for "full and fair litigation" of that claim. *See id.* at 494, 96 S.Ct. 3037. We have held that such a claim is cognizable under section 2254

only if "the state provided no procedure by which the prisoner could raise his Fourth Amendment claim, or the prisoner was foreclosed from using that procedure because of an unconscionable breakdown in the system." *Willett v. Lockhart*, 37 F.3d 1265, 1273 (8th Cir.1994) (en banc), *cert. denied*, 514 U.S. 1052, 115 S.Ct. 1432, 131 L.Ed.2d 313 (1995). Accordingly, because it is undisputed that Newman was afforded a full and fair opportunity to litigate his Fourth Amendment claim in the state courts, the State argues that *Stone* bars the reassertion of that claim in this action.

Newman counters by contending that *Stone* does not bar federal court review of a state court's harmless error analysis of a Fourth Amendment violation. This argument presents a nice question, but one which we need not address because, as will be seen, we are holding that Newman is entitled to a new trial, at which the challenged evidence will of course be inadmissible in light of the Nebraska Supreme Court's holding that it was error to deny the motion to suppress.

B.

Newman challenges his conviction on the ground that he was denied due process by the trial court's refusal to allow him to present a voice exemplar to the jury without waiving his right against self-incrimination. He argues that because the State can compel him to produce a voice exemplar without violating the Fifth Amendment, due process principles of reciprocity allow him to present a voice exemplar to the jury without waiving his constitutional protections.

The primary issue at trial was whether Newman fit the description of the attacker. An important component of that determination was whether Newman has a Hispanic accent. Newman asked the trial court for permission to present a voice exemplar, consisting of the reading of a neutral statement, to prove that he does not have a Hispanic accent. The trial court sustained the State's objection to the proffered exemplar, ruling that Newman could testify in any voice he wished, so long as he testified under oath and subjected himself to cross-examination. Given this choice, Newman chose not to present a voice exemplar.

The Due Process Clause of the Fourteenth Amendment includes the right of an accused to "a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). This right includes the right to present his own witnesses. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). In *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973), the Supreme Court held that the Due Process Clause barred enforcement of a state notice-of-alibi rule that did not provide the defendant reciprocal discovery rights against the government. *Id.* at 472, 93 S.Ct. 2208. The Court noted that although the Due Process Clause says little about the amount of discovery a defendant must be afforded, it does "speak to the balance of forces between the accused and his accuser." *Id.* at 474, 93 S.Ct. 2208.

A defendant may be compelled to provide a voice exemplar over his assertion of a claim of Fifth Amendment privilege. *See United States v. Dionisio*, 410 U.S. 1, 6-7, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); *United States v.*

Wade, 388 U.S. 218, 222-23, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *United States v. Leone*, 823 F.2d 246, 250 (8th Cir.1987). Accordingly, we conclude that the Court's recognition in *Wardius* of a defendant's reciprocal right of discovery, when read in light of the Court's reference to *Washington v. Texas*, *see* 412 U.S. at 474 n. 6, 93 S.Ct. 2208, reflects an expression of clearly established federal law that a defendant is entitled to introduce a voice exemplar without waiving his Fifth Amendment privilege against self-incrimination.

The Nebraska Supreme Court recognized as much when, after discussing *Wade*, *Dionisio*, and *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), it held that "if relevant and reliable, a voice exemplar may be offered into evidence by a criminal defendant without waiving his or her Fifth Amendment privilege against self-incrimination." *Newman*, 548 N.W.2d at 752. The court went on to hold that the trial court "erred in effectively ruling that Newman's offer of a voice exemplar would waive his Fifth Amendment privilege and subject him to cross-examination." *Id.* Addressing the relevancy component of the test of admissibility, the court found that in view of the conflicting testimony with respect to whether Newman spoke with a Hispanic accent, "the presentation of a voice exemplar would have been relevant evidence going to the issue of identity." *Id.*

The court then addressed the question of the reliability of the proffered exemplar, referring to decisions which have noted the fact that by its very nature voice exemplar evidence is different from other common types of exemplar or demonstrative evidence. *See, e.g.*, *People v. Scarola*, 71 N.Y.2d 769, 525 N.E.2d 728, 530

N.Y.S.2d 83 (1988); *United States v. Esdaille*, 769 F.2d 104 (2d Cir.1985). *See Newman*, 548 N.W.2d at 752. Contrasting voice exemplar evidence with physical evidence such as scars and tattoos, the court said, "In contrast, voice exemplar evidence is relatively easy to feign. An accent can be exaggerated or muted through a person's conscious efforts, such as avoiding particular words that one cannot pronounce without an accent." *Id.* The court concluded that "[s]ince Newman made no offer to establish the genuineness of the exemplar, it would have been properly excluded as irrelevant. That is to say, in the words of the State's objection, the conditions under which Newman spoke to the victim could not be reproduced."[3] *Id.* Thus, reasoned the court, because the proffered exemplar would have been properly excluded on other grounds, Newman suffered no prejudice as a result of the trial court's erroneous ruling on the Fifth Amendment issue.

The question, then, is whether the Nebraska Supreme Court's failure to remedy the denial of Newman's right to present the voice exemplar without waiving his Fifth Amendment right against self-incrimination resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent. *See Long v. Humphrey*, 184 F.3d 758, 760 (8th Cir.1999). We conclude that it did,

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[3] With all due respect, we do not read the State's objection as having been based upon the ground stated by the court. Rather, as we read the record, the State argued that, contrary to the position taken by Newman's counsel, the Supreme Court's decision in *Wade* was not on point in that that case involved words spoken by a defendant during a lineup and not during trial.

for the effect of the court's decision was to forever foreclose Newman from proffering a voice exemplar that might satisfy the court's standard of reliability.

The State argues that the state court's decision constituted a ruling on a matter of state evidentiary law, a question that is ordinarily not cognizable in a section 2254 action. *See, e.g., Turner v. Armontrout,* 845 F.2d 165, 169 (8th Cir.1988). We disagree. We do not view the Nebraska Supreme Court's holding as constituting a ruling on the evidentiary insufficiency of Newman's proffered exemplar, for Newman was never given an opportunity to make a showing of reliability. Once the trial court ruled that Newman would be required to waive his Fifth Amendment privilege against self-incrimination, the issue was closed, for there would have been no point in Newman's attempting to make such a showing in the face of that ruling. Rather, we read the Nebraska Supreme Court's statement that "the conditions under which Newman spoke to the victim could not be reproduced" as a *per se* rule of exclusion akin to that which the United States Supreme Court has held infringes impermissibly upon a defendant's right to testify on his own behalf. *See Rock v. Arkansas,* 483 U.S. 44, 56-62, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). In any event, even if the Nebraska Supreme Court's ruling is viewed as one touching solely upon an evidentiary matter, we conclude that by in effect precluding Newman from attempting to make a showing of the voice exemplar's reliability, it infringed upon Newman's constitutional right to present a defense and thus is reviewable in an action for federal habeas relief. *See Wallace v. Lockhart,* 701 F.2d 719, 724 (8th Cir.1983).

There remains the question whether the error in requiring Newman to waive his Fifth Amendment privilege as a condition of introducing a voice exemplar was harmless. *See Olesen v. Class*, 164 F.3d 1096, 1100 (8th Cir.1999). Because the state courts did not review the claim for harmless constitutional error, we apply the stricter standard set forth in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), rather than the more deferential standard enunciated in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). *See Harrington v. Iowa*, 109 F.3d 1275, 1279 (8th Cir.1997); *Orndorff v. Lockhart*, 998 F.2d 1426, 1430 (8th Cir.1993). Under *Chapman*, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24, 87 S.Ct. 824.

As the Nebraska Supreme Court stated, "The central issue at trial was the identity of the perpetrator of the crime." *Newman*, 548 N.W.2d at 752. Whether Newman has a Hispanic accent was an important factor in determining whether he fit the description of the attacker. It is of more than passing significance that Newman's first trial ended in a mistrial because the jury could not reach a unanimous verdict. Had Newman been afforded his due-process right to introduce the voice exemplar, the jury might well have reached a different conclusion in the second trial. Therefore, we cannot say that the trial court's erroneous ruling was harmless beyond a reasonable doubt. In so ruling, we recognize, as noted above, that the Nebraska Supreme Court held that what it considered to be overwhelming evidence rendered harmless beyond a reasonable doubt the erroneous receipt into

evidence of the black leather jacket, which the court viewed as merely cumulative physical evidence. We conclude that in the circumstances of this case the denial of the right to present what would have been exculpatory evidence had consequences far more serious than the erroneous receipt of inculpatory evidence of only marginal probative force. Newman's claimed lack of a Hispanic accent was apparently the only defense he had to offer. There may be cases in which the wrongful exclusion of such evidence might be considered harmless, but we conclude that this is not one of them.

Although on retrial Newman will be entitled to offer a voice exemplar without waiving his privilege against self-incrimination, he will of course be required to establish its reliability. *See Esdaille*, 769 F.2d at 107 (holding that proposed voice exemplar was properly excluded as unreliable). Whether he is able to do so will be a matter for the state courts to decide.

The judgment denying the petition for writ of habeas corpus is reversed, and the case is remanded to the district court with instructions to enter a writ discharging Newman from custody unless the state, within a reasonable period of time, grants him a new trial.

STATE OF NEBRASKA, APPELLEE, V. JOHN BYRON NEWMAN, APPELLANT.

548 N.W.2d 739

Filed June 7, 1996. No. S-94-833.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Lancaster County, EARL J. WITTHOFF, Judge. Judgment of Court of Appeals affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Webb E. Bancroft for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

WHITE, C.J. CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

After the jury found the defendant, John Byron Newman, guilty of first degree sexual assault, in violation of Neb. Rev. Stat. § 28-319(1) (Reissue 1989), the district court held an enhancement hearing at which it was determined that this was not Newman's first such conviction. In accordance with the provisions of Neb. Rev. Stat. § 28-105 (Reissue 1989) and § 28-319(2) and (3), the district court then sentenced Newman to imprisonment for a period of not less than 25 nor more than 50 years, without the possibility of parole. Newman thereupon appealed to the Nebraska Court of Appeals, asserting, in summary, that the district court erred in (1) not suppressing certain evidence, (2) other evidential rulings, and (3) finding the

evidence sufficient to support the conviction. The Court of Appeals affirmed the district court's judgment. *State v. Newman*, 4 Neb. App. 265, 541 N.W.2d 662 (1996). Newman then successfully petitioned this court for further review. We now affirm the judgment of the Court of Appeals.

II. FACTS

At approximately 11 p.m. on the evening of March 21, 1993, the victim fell asleep with her 3-year-old son while watching television in the living room of the Lincoln, Lancaster County, Nebraska, apartment in which they lived. During the early morning hours of March 22, she was awakened by a knock at the living room door. She got up and looked through the peephole and, seeing nothing, opened the door slightly. Now noticing a man outside, she asked if he had the wrong apartment. Replying that he did not, the man forced his way inside. As she backed away, the victim started hitting and kicking, and asked what he was doing. The man kept coming toward her and eventually pushed her down on the couch.

At this point, the victim was lying lengthwise on the couch with the man between her legs. As she threatened to scream, the man grabbed her by the throat and told her that if she did so, he was going to "bash [her] fucking head in." He then began squeezing her throat as he unfastened her belt and removed her clothing, which consisted of a green shirt, bra, jean shorts, underwear, shoes, socks, and a white T-shirt. The man then opened his pants, pulled them down past his buttocks, and

unsuccessfully tried to insert his penis into the victim's vagina.

The man next picked the victim up in a "bear hug" and carried her into a bedroom. Once there, he threw her on the bed and again attempted coitus. Being again unsuccessful, he inserted a finger into the victim's vagina. At this point, although she had never seen him and did not know him, the man spoke the victim's name and told her that he had wanted to do this for awhile. The man then attempted to muffle the sound of the victim's cries by putting a pillow over her face.

After awhile, he got up, turned on the lights, and threw a blanket and pillow over the victim's face so she could not see. He again made an attempt to copulate; when this effort also failed, the man asked the victim to "more or less jack him off." She refused and started hitting him with her fist. The man then suddenly stood up, turned off the light, and began to say repeatedly, " 'This didn't happen.' " The man next began putting on his clothes, all the while making sure that the blanket still covered the victim's face.

After the man had left the room, the victim stayed where she was until she heard a door shut. As she began to get up from the bed, the man came back into the bedroom and said, " 'I told you not to move.' " He then pushed her back down onto the bed, covered her head with a pillow, and left the room. The victim remained in the bedroom until she heard the man moving around and the door shut again. She then got up and went into the living room to check on her son and tried to call the police, but discovered that the line to that telephone had

been cut. She also found that the clothing her attacker had removed from her had disappeared.

The victim called the Lincoln police from another telephone in the kitchen. She was still on the telephone with the dispatcher when the police arrived. The victim described her attacker as a Hispanic male between 5 feet 6 and 5 feet 8 inches tall, with an olive complexion, dark brown or black hair, and a mustache, and as wearing a white T-shirt, black pants, and a black leather jacket. She also told the police that she thought her attacker had a slight Hispanic accent "because he was short with the words and things" and sounded different than what she was accustomed to hearing.

Using a dog to track the trail of the suspect leading from the victim's apartment, the police were led to a dumpster where they recovered the victim's missing clothing. At trial, the victim identified the recovered items as the clothing she was wearing on the night of the assault.

After giving the police an account of the events, the victim was taken to a hospital where she was examined. Sometime later, she went to the police station, gave a statement, and with the aid of a computer created a composite sketch of her attacker.

While at the police station, the victim was shown a photographic array which did not contain Newman's picture and was asked if she could identify her attacker from among the six photographs she was presented. Although the victim did not identify anyone as her attacker, she did point out that some of the men depicted had features similar to those of her attacker.

On March 23, 1993, the victim was shown a second set of six photographs which did not include Newman and again was asked if she could identify her attacker. She did not identify anyone depicted in the array as her attacker.

Two days later, on March 25, 1993, the victim was shown a third set of six photographs. The police officer who presented the photographs told the victim to take her time in examining them. However, the victim testified that she "knew immediately who it was, what number it was," and selected photograph No. 4, a picture of Newman.

After the victim had identified Newman as her attacker, the police determined that Newman had taken an Amtrak train to Las Vegas, Nevada. The Nevada police were notified, and pursuant to a fugitive arrest warrant, Newman was arrested at the Amtrak train station in Las Vegas. Immediately upon being arrested, Newman was frisked and handcuffed. The police discovered no contraband or weapons upon his person.

Newman had three dark-colored, soft-sided suitcases with him. Without attempting to first open the suitcases, the police put them in the trunk of their vehicle and transported Newman and the suitcases to a detention center. When Newman arrived at the detention center at approximately 8:50 a.m. on March 26, 1993, the processing officer asked Newman if he had any valuables to declare. Newman responded that he did and listed on an "Inmate's Property Inventory and Release" form a black wallet, two watches, a necklace, a $20,000 cashier's check, and bulk property composed of the three suitcases.

Later that morning, at around 10:30 a.m., the Nevada police contacted a Lincoln police detective and informed him that Newman was in custody. The detective asked if Newman was wearing a black leather jacket and white tennis shoes when he was arrested. Upon being told that he was not, the detective informed the police that the jacket and tennis shoes were needed as evidence. At approximately 11:15 a.m., two Nevada police officers went to the detention center property room and retrieved the requested items from one of Newman's suitcases.

On April 8, 1993, a Lancaster County deputy sheriff traveled to Las Vegas to pick up Newman. He logged Newman and his possessions, including the black leather jacket and white tennis shoes, into the Lancaster County jail on April 9. The deputy sheriff testified that he spoke with Newman during the trip, and it was his opinion that Newman had a Hispanic accent.

Newman filed a motion to suppress his identification in the photographic lineup and also filed a motion to suppress the jacket and tennis shoes.

At the suppression hearing, Newman and the State stipulated to the events following Newman's arrest. They also stipulated that it was the policy of the detention center to look through the suitcases for contraband, weapons, or explosives if they had not been searched by law enforcement officers prior to arriving at the detention center, but that no further inventory would be made before the suitcases were placed in the police property room. No warrant was sought or obtained to search the suitcases, and to Newman's knowledge, they were not

opened or searched for inventory purposes. The district court overruled both of Newman's motions.

Although at trial the State did not offer the white tennis shoes into evidence, the black leather jacket was offered and received over Newman's objection. In addition, at trial, the victim identified Newman as her attacker and identified the leather jacket seized from Newman as being similar to the jacket her attacker was wearing the night of the assault.

Newman also filed a motion in limine to bar the prosecution from offering the testimony of Russell Grady and Julie Denny, on the ground that their testimony was more prejudicial than probative. The district court denied Newman's motion, and the testimony of both witnesses was admitted at trial over Newman's objections.

Grady testified that on March 22, 1993, at about 12:15 a.m., he was sitting in his automobile waiting to pick up a friend. Grady observed that a woman was being followed about a quarter of a block behind by a man Grady later identified as Newman. Grady stated that Newman was wearing a black leather jacket and white tennis shoes. Grady saw the woman enter an apartment complex, after which Newman ran to the complex doors and looked in. Newman then walked back to the sidewalk and watched the building. When a light went on in an apartment in the right top corner of the building, Newman walked away.

Thinking Newman's behavior was unusual, Grady followed him and saw Newman walk to a building approximately two blocks from the victim's apartment. Grady drove around the block and continued to keep track of Newman. After approximately 45 minutes from

the time he had initially seen Newman, Grady flagged down a patrol vehicle and reported what he had seen to the police. Grady also gave the police a description of Newman and then left.

After a couple of days, a detective visited Grady at work and asked him if he could pick out the man he saw from a set of photographs. Grady did not select any of the photographs shown to him. A few days later, Grady was shown a second set of photographs at his home. This time, Grady selected Newman's photograph and at trial identified Newman as the man he saw on March 22, 1993. Grady also identified the leather jacket seized from Newman's suitcase as similar to the jacket he saw Newman wearing that night.

Denny testified that she saw Newman on the night of March 22, 1993. Denny left work at approximately 10:15 p.m. and drove to her home approximately eight blocks from the victim's apartment. When Denny got to her residence, she thought she heard something dragging under her automobile, so she pulled into her apartment parking lot and looked to see if there was anything lodged underneath. When she stood up, there was a man behind her. He was wearing a black leather jacket and white tennis shoes. He asked Denny whether she knew a certain couple living in the building and then followed her to some stairs. Denny testified that the man also asked her if she was married or had a boyfriend. Denny continued walking and then went up the stairs to her apartment. The next evening, she reported her encounter with the man to the police.

Approximately 2 days later, Denny went to the police station and attempted to produce a composite drawing of the man she saw. Several days after that, a police officer went to Denny's apartment and asked her if she could identify the man she saw from an array of photographs. Denny identified Newman in photograph No. 4 as that man. On cross-examination, Denny testified that the man who spoke to her that night did not have a Hispanic accent.

The prosecution also offered the testimony of Rev. Stewart Firnhaber. Firnhaber testified that he had met Newman in March 1993 when Newman went to Firnhaber's home for dinner. On that occasion, Newman was wearing a black leather jacket, a white shirt, and white tennis shoes. Firnhaber testified that Newman told him that he planned to travel by train to the west coast and then fly to the Philippines and on to Germany. Firnhaber testified that Newman did not have a Hispanic accent.

At the close of the prosecution's case in chief, Newman unsuccessfully moved for a directed verdict. He then attempted to introduce a voice exemplar by reading a "fairly neutral" statement to establish that he did not have a Hispanic accent. The State objected on the ground that the conditions under which Newman spoke to the victim could not be reproduced. The district court sustained the State's objection, ruling that Newman could "testify in any voice" he wished, provided that he did so under oath and subjected himself to cross-examination. Newman elected not to present any evidence.

III. ANALYSIS

1. Suppression of Evidence

In the first assignment of error, Newman asserts that the district court wrongly failed to suppress the pretrial and in-court identifications of him, as they were tainted by impermissible suggestions, and that the district court wrongly overruled his motion to suppress the evidence seized from his suitcases.

(a) Scope of Review

A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

(b) Application of Law to Facts

(i) Identification

In urging in the first part of this assignment of error that the district court should have suppressed the identification testimony, Newman argues that the police employed unconstitutionally suggestive identification techniques. He maintains that the photographic array shown to the victim was impermissibly suggestive and

that the police made statements to her which led her to pick his photograph. Newman argues that as a result, the district court should have suppressed not only the victim's pretrial identification, but her in-court identification as well.

Whether identification procedures in connection with photographic arrays were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of all the circumstances surrounding the procedures. See, *State v. Gibbs,* 238 Neb. 268, 470 N.W.2d 558 (1991); *State v. Price,* 229 Neb. 448, 427 Neb. 81 (1988).

Newman maintains that because his photograph was newer than the other photographs in the array, a subtle message was conveyed to the victim that he was the person who had most recently had contact with the law. Newman also maintains that out of the six photographs in the array, his was distinctive because it clearly portrayed him as the shortest and smallest of the men, a fact of no small significance in view of the victim's description of her attacker as a short man. In addition, Newman argues that the officer who showed the photographic array to the victim improperly influenced her because he told her that she did not "have to pick one out real fast." According to Newman, such a statement implied to the victim that she did in fact have to pick one of the photographs from the array.

An examination of the photographic array fails to support Newman's contentions. There is no apparent difference in the age of the photographs in the array, and we are unable to discern the relative heights of the suspects

depicted in the photographs. Nor was the officer's statement suggestive. We do not understand how any reasonable person would understand the statement, "Take your time. You don't have to pick one out real fast," to mean that a suspect had to be identified. The statement would be more reasonably understood to mean that one should take one's time in examining the photographs. The pretrial identification not being unduly suggestive and conducive to an irreparably mistaken identification, it could not have improperly tainted the victim's in-court identification of Newman.

(ii) Seizure

In the second part of this assignment of error, Newman argues that the evidence seized from his suitcase was obtained in violation of U.S. Const. Amend. IV and Neb. Const. art. I, § 7. Both the Fourth Amendment and article I, § 7, protect against unreasonable searches and seizures by the government. *State v. Neely*, 236 Neb. 527, 462 N.W.2d 105 (1990). Searches conducted pursuant to a warrant supported by probable cause are generally considered to be reasonable. *Id.* " '[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.' " *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971). These exceptions are " 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' " 403 U.S. at 455.

As no warrant was sought or obtained to search the contents of Newman's suitcases, the State has the burden of showing that the search falls within one of the established exceptions to the warrant requirement.

The State argues that the search was proper under the inventory exception and the "plain view" doctrine. According to the State, at the time Newman was processed into the detention center, he indicated that he had certain items of value in his suitcases which should be inventoried. Then, "[a]pparently, both as a result of Newman's statement, and as a result of their own policy to search the baggage for contraband, the luggage confiscated along with Newman was inventoried." Brief for appellee at 27. During the inventory search, the Nevada police discovered that the Lincoln police had requested the items and thus seized them as evidence. The State maintains that the seizure of the jacket and the shoes was permissible under the plain view doctrine because the police had a right to be in the suitcases as a result of the inventory search and because the items were in plain view with their incriminating nature immediately apparent due to the information from the Lincoln police.

The State's argument, however, is premised on a gross mischaracterization of the record. First, the record nowhere reflects that Newman told the authorities at the detention center that his suitcases contained items of value which should be inventoried. It is true that Newman listed his valuables on a form provided him, but he did not indicate that the three suitcases contained valuables which needed to be inventoried. The suitcases were merely listed on the form as bulk property. Second, although it was the policy of the detention center to

conduct an inventory search of the suitcases for contraband, weapons, or explosives before placing them in the property room, that policy was not followed in this case. The suitcases were inventoried as bulk property and not opened before being stored in the property room. It was only after the Lincoln police told the Nevada police that certain items were needed as evidence that Newman's suitcases were opened and searched.

Thus, in turning our attention to the applicability of the inventory exception to the challenged search, we consider the evidence as it is, not as the State misstates it to be.

Both the U.S. Supreme Court and we have consistently held that inventory searches after an arrest are permissible. *Illinois v. Lafayette*, 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983); *State v. Filkin*, 242 Neb. 276, 494 N.W.2d 544 (1993); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Hill*, 214 Neb. 865, 336 N.W.2d 325 (1983). However, the propriety of an inventory search is judged by a standard of reasonableness, and such a search must be conducted in accordance with standard operating procedures. *Filkin, supra.* As we noted in Filkin, the reason for requiring standardized criteria or an established routine to regulate inventory searches is that

> "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into 'a purposeful

> and general means of discovering evidence of crime. . . . ' "

Id. at 282, 494 N.W.2d at 549, citing *Florida v. Wells*, 495 U.S. 1, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990).

The purpose of the inventory exception, therefore, is not to avoid the requirements of the Fourth Amendment, but, rather, to advance legitimate governmental interests which include (1) protecting the property of an arrestee in custody, (2) protecting the police from groundless claims that an arrestee's property has not been properly safeguarded, (3) protecting or maintaining the security of a detention facility by preventing the introduction of weapons or contraband into the facility, and (4) ascertaining or verifying an arrestee's identity. *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991).

The suitcase search conducted here was not a routine inventory search. The officers were clearly engaged in a purposeful search for incriminating evidence identified by the Lincoln police. Because the search does not fall within the boundaries of the inventory exception to the warrant requirement, the district court erred in denying Newman's motion to suppress.

However, not all trial errors, even those of constitutional magnitude, entitle an accused to a reversal of an adverse trial result; it is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside. *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996); *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994); *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992).

Of those items that were unconstitutionally seized from Newman's suitcases, only the black leather jacket was admitted into evidence at trial. While the State would have been well advised to have left it out, the record reveals that this bit of physical evidence was cumulative. The victim gave a detailed description of her attacker which matched Newman's physical characteristics. She later identified Newman from a photograph in which Newman was not wearing a black leather jacket. Grady and Denny also gave detailed descriptions of Newman's physical characteristics and were able to identify him from a photograph in which he was not wearing a black leather jacket. In addition, all of these witnesses identified Newman at trial when he was not wearing a jacket. Thus, absent the jacket, the evidence that Newman perpetrated the crime was overwhelming. As a consequence, the erroneous receipt of the jacket into evidence was harmless beyond a reasonable doubt.

(c) Resolution

For the foregoing reasons, the first assignment of error fails.

2. Other Evidential Rulings

In the second assignment of error, Newman challenges the district court's receipt of the testimony of witnesses Grady and Denny and its effective ruling that admitting the exemplar of Newman's voice would waive Newman's Fifth Amendment privilege against self-incrimination and subject him to cross-examination.

(a) Scope of Review

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by those rules, not by judicial discretion, except in those instances in which the rules make judicial discretion a factor. *Floyd v. Worobec*, 248 Neb. 605, 537 N.W.2d 512 (1995); *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994).

(b) Applicability of Law to Facts

(i) Testimony

Newman first argues that Grady and Denny's testimony should have been excluded because it was offered for an improper purpose and not for one of the purposes listed in Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404(2) (Reissue 1995), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In addition, Newman argues that even if the evidence was admissible under § 27-404(2), it was more prejudicial than probative and thus should have been excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), which reads, in relevant part: "Although relevant,

evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . . "

It has been firmly established that § 27-404(2) is a rule of inclusion, rather than exclusion, and permits the use of relevant bad acts for all purposes except to prove the character of a person in order to prove that the person acted in conformity with that character. *Carter, supra; State v. Wood,* 245 Neb. 63, 511 N.W.2d 90 (1994); *State v. Perrigo,* 244 Neb. 990, 510 N.W.2d 304 (1994); *State v. Martin,* 242 Neb. 116, 493 N.W.2d 191 (1992); *State v. Stephens,* 237 Neb. 551, 466 N.W.2d 781 (1991). The list of acceptable uses recited in the statute is illustrative and not meant to be exclusive. *Carter, supra; Perrigo, supra.* However, evidence which is otherwise admissible under § 27-404(2) may be excluded under § 27-403 if its probative value is substantially outweighed by other considerations. *Wood, supra.*

Therefore, we review the admission of evidence of other acts under § 27-404(2) by considering (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted. *Carter, supra; Wood, supra; Martin, supra.*

It is within the discretion of a trial court to determine the admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent an abuse of discretion. *Wood, supra; State v. Bronson,* 242 Neb.

931, 496 N.W.2d 882 (1993). An abuse of judicial discretion means that the reasons or rulings of a trial court are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Parmar,* 249 Neb. 462, 544 N.W.2d 102 (1996); *Carter, supra; State v. Thomas,* 238 Neb. 4, 468 N.W.2d 607 (1991).

With these standards in mind, we turn to consider whether Grady and Denny's testimony was properly admitted at trial.

We first consider the relevancy of the testimony. Relevant evidence means any evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995); *State v. Simants,* 248 Neb. 581, 537 N.W.2d 346 (1995).

The testimony was relevant because it placed Newman in the area where the sexual assault occurred near the time it occurred. That being so, we must next determine whether the testimony was admitted for a proper purpose. It is clear that the purpose of the testimony was to place Newman at the time and place of the crime. This is a permissible purpose under § 27-404(2) because the evidence tends to show that Newman had the opportunity to commit the crime in question. There is therefore no merit to Newman's contention that the testimony was admitted for an improper purpose.

The question thus becomes whether the testimony should have been excluded because it presented a danger of unfair prejudice. For the purposes of this rule, the

probative value of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the issues in the case. *State v. Eona*, 248 Neb. 318, 534 N.W.2d 323 (1995); *Perrigo, supra*. Unfair prejudice means an undue tendency to suggest a decision based on an improper basis. *Eona, supra; Perrigo, supra*.

The testimony clearly had probative value. Grady's testimony placed Newman just a couple of blocks from the crime scene a few hours before the sexual assault occurred. Denny's testimony established that later on the same day as the sexual assault, Newman was approximately eight blocks from the victim's apartment. Any improper inferences that the jury might have drawn from the testimony of the two witnesses simply do not substantially outweigh the considerable probative value of their testimony. We also note that the district court gave a limiting instruction which admonished the jury that the testimony was to be received for the limited purpose of placing Newman in the area and no other.

Because the evidence admitted was relevant, had a proper purpose, had probative value outweighing its unfair prejudice, and was accompanied by a limiting instruction, the district court did not abuse its discretion in admitting the evidence at trial.

(ii) Voice Exemplar

Newman next contends that the district court erred when it in effect held that he would waive his Fifth Amendment privilege against self-incrimination and be

subject to cross-examination if he presented a voice exemplar to the jury. Newman maintains that the court's ruling denied him due process of law because he was effectively precluded from offering the voice exemplar in his defense.

It is well established that the Fifth Amendment privilege against self-incrimination protects only against compulsion to engage in testimonial self-incriminating activity. *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L.Ed.2d 1149 (1967); *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). Both state and federal courts have usually held that the privilege "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Schmerber*, 384 U.S. at 764. See, also, *State v. Swayze*, 197 Neb. 149, 247 N.W.2d 440 (1976).

Thus, a defendant may be compelled to produce a voice exemplar because

> [t]he results of voice identification tests fall within the category of real or physical evidence. . . . In such a test, the speaker is asked, not to communicate ideas or knowledge of facts, but to engage in the physiological processes necessary to produce a series of articulated sounds, the verbal meanings of which are unimportant. The sounds alone are elicited for identification purposes through characteristics such as pitch, tone, intonation, accent, and word stress. The speech patterns of individuals are distinctive physical characteristics that serve to identify them just as do other physical characteristics

> such as color of eyes, hair, and skin, physical build and fingerprints.

People v. Ellis, 65 Cal.2d 529, 533-34, 421 P.2d 393, 395, 55 Cal. Rptr. 385, 387 (1966). See, also, *Wade, supra* (compelling defendant to produce voice exemplar did not violate Fifth Amendment). The U.S. Supreme Court has also held that there is no constitutional bar to compelling a grand jury witness to read transcripts of intercepted conversations into a recording device. *United States v. Dionisio*, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973).

Newman urges that as the State could have compelled him to produce a voice exemplar without infringing on his Fifth Amendment privilege, due process principles of reciprocity demand that he be allowed to present a voice exemplar to the jury without waiving his privilege and becoming subject to cross-examination.

Other courts which have addressed this issue have held that due process reciprocity would allow an otherwise admissible voice exemplar to be introduced by a defendant without waiving his or her Fifth Amendment privilege against self-incrimination. *People v. Scarola*, 71 N.Y.2d 769, 525 N.E.2d 728, 530 N.Y.S.2d 83 (1988); *United States v. Esdaille*, 769 F.2d 104 (2d Cir. 1985), *cert. denied* 474 U.S. 923, 106 S. Ct. 258, 88 L. Ed. 2d 264. However, these courts have emphasized that the nontestimonial nature of a voice exemplar does not automatically require its admission into evidence. The defendant must still show that the voice exemplar is relevant and reliable.

We conclude that if relevant and reliable, a voice exemplar may be offered into evidence by a criminal

defendant without waiving his or her Fifth Amendment privilege against self-incrimination.

Thus, the district court erred in effectively ruling that Newman's offer of a voice exemplar would waive his Fifth Amendment privilege and subject him to cross-examination. However, this does not necessarily mean that Newman was prejudiced by the district court's ruling, for the ruling may have been correct for other reasons.

The question is whether the voice exemplar was relevant and possessed sufficient reliability to be admitted. The central issue at trial was the identity of the perpetrator of the crime. The victim testified she thought that her attacker had a slight Hispanic accent. The other witnesses disagreed about whether Newman had an accent. The deputy sheriff who transported Newman back from Nevada testified that Newman spoke with an accent. But Denny and Firnhaber both testified that Newman did not speak with an accent. Thus, the presentation of a voice exemplar would have been relevant evidence going to the issue of identity.

That determination brings us to the question of the reliability of the proffered exemplar. For most exemplar or demonstrative evidence to be admissible, the proponent must show that the proffered evidence is reliable. In that regard, as other courts have noted, voice exemplar evidence by its very nature is different from other common types of exemplar or demonstrative evidence. *Scarola, supra; Esdaille, supra.* For example, the defendant in *People v. Shields,* 81 A.D.2d 870, 438 N.Y.S.2d 885 (1981),

attempted to display a 14- to 16-inch scar on his abdominal region that the complaining witness, a rape victim, did not mention. Since the *Shields* defendant proffered hospital records showing that the scar had predated the crime, there was no possibility of the scar's lack of authenticity. The same rationale has been applied to tattoos on a defendant's body. If a defendant can demonstrate that the tattoos predated the crime and that the crime victim would have had reason to notice the tattoos during the incident, it would be proper to permit the defendant to exhibit the tattoos to the jury without being subject to cross-examination. *Scarola, supra.*

In contrast, voice exemplar evidence is relatively easy to feign. An accent can be exaggerated or muted through a person's conscious efforts, such as avoiding particular words that one cannot pronounce without an accent. Since Newman made no offer to establish the genuineness of the exemplar, it would have been properly excluded as irrelevant. That is to say, in the words of the State's objection, the conditions under which Newman spoke to the victim could not be reproduced.

(c) Resolution

Thus, the second assignment of error also fails.

3. Sufficiency of Evidence

In the third and final assignment of error, Newman claims the district court mistakenly concluded that the evidence is sufficient to support his conviction.

(a) Scope of Review

Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact; a conviction will be affirmed in the absence of prejudicial error if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995); *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995). See, also, *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 526 N.W.2d 657 (1995).

(b) Application of Law to Facts

At the time in question, § 28-319(1) provided, in relevant part, that one "who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion . . . is guilty of sexual assault in the first degree." Neb. Rev. Stat. § 28-318 (Reissue 1989) defined "sexual penetration" as including not only "sexual intercourse in its ordinary meaning," but "any intrusion, however slight, of any part of the actor's . . . body . . . into the genital . . . openings of the victim's body. . . . Sexual penetration shall not require emission of semen. . . . "

Thus, the State had the burden to prove beyond a reasonable doubt that at the time and place in question, Newman overcame the victim by force, or the express or

implied threat thereof, and that he sexually penetrated her, no matter how slightly. *See, State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994); *State v. Dondlinger*, 222 Neb. 741, 386 N.W.2d 866 (1986).

We have previously determined that except for the harmless erroneous admission of Newman's black leather jacket, the district court made proper evidential rulings. The properly admitted evidence detailed previously, viewed in the light most favorable to the State, amply supports findings that at the time and place in question, Newman overcame the victim by force and that he sexually penetrated her, if in no other way, by inserting one of his fingers into her vagina.

(c) Resolution

Accordingly, the third and last assignment of error fails as well.

IV. JUDGMENT

As first noted in part I, the judgment of the Court of Appeals is affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN BYRON NEWMAN, Petitioner, vs FRANK X. HOPKINS, Respondent.	)	4:96CV3287 **REPORT AND RECOMMENDATION** (Filed March 26, 1998)

The Amended Petition for habeas corpus relief raises five claims in challenging John Newman's 1994 conviction, in the Lancaster County Nebraska District Court, of first degree sexual assault. Petitioner's first trial ended in a mistrial when the jury was unable to agree on a verdict. His second trial resulted in a conviction. He was sentenced to imprisonment for a term of 25-50 years.

On direct appeal to the Nebraska Court of Appeals, the conviction and sentence were affirmed. *State v. Newman*, 4 Neb.App. 265 (1995). Petitioner then petitioned the Nebraska Supreme Court for further review, which was granted. That court also affirmed the conviction and sentence. *State v. Newman*, 250 Neb. 226 (1996). He then filed his petition in this court, raising the same claims he raised to the Nebraska appellate courts. Counsel agree that there is no issue of procedural default or exhaustion of state remedies.

The facts as found in the state courts are recited by the Nebraska Supreme Court's decision in this case and need not be repeated here.

Petitioner raises these claims:

> Claim 1. Petitioner's conviction was the result of evidence obtained in violation of the Fourth Amendment.
>
> Claim 2. Petitioner was denied due process of law by the trial court's refusal to allow him to demonstrate his speaking voice, without waiving his Fifth Amendment privilege of silence and subjecting him to cross examination.
>
> Claim 3. Petitioner was denied due process of law when the trial court overruled his objections to testimony by witnesses Russell Grady and Julie Denny.
>
> Claim 4. Petitioner was denied due process of law when the trial court overruled his objections to the identification testimony of the victim, the fruit of an unduly suggestive photo array.
>
> Claim 5. Petitioner was denied due process of law in that insufficient evidence supported the verdict.

Amended Petition, filing 10. These claims must be reviewed under the new standards of 28 U.S.C. § 2254(d).[1]

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[1] "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

Claim 1

Petitioner's Fourth Amendment claim is not an adequate claim for relief in habeas corpus. The Supreme Court in *Stone v. Powell*, 428 U.S. 465 (1976) barred habeas courts from considering Fourth Amendment claims when the state courts have provided the petitioner a full and fair opportunity to litigate such claims. Although the Eighth Circuit previously permitted a review of whether the state courts' hearings on such claims were in fact full and fair and resulted in factual findings supported by the record, that position was later changed. *Willett v. Lockhart* 37F.3d 1265 (8th Cir. 1994):

> We conclude that under *Stone* a federal habeas court considering a state prisoner's claim alleging a Fourth Amendment violation should abstain from reviewing the state court records to determine if the state's factual findings are fairly supported by the record as a whole, and we overrule *Howard v. Pung* [862 F.2d 1348 (8th Cir. 1988)] to the extent that it requires otherwise. Rather, the proper inquiry is whether "the State has provided an *opportunity* for full and fair litigation" of the claim. *Stone*, 428 U.S. at 482, 494, 96 S.Ct. at 3046, 3052.

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(d). This provision, part of the Anti-terrorism and Effective Death Penalty Act, became effective April 24, 1996. This case was filed July 30, 1996. No argument is made that the 1996 amendments do not govern this case.

37 F.3d at 1270 (emphasis added). Further,

> The *Stone* bar applies despite a state court's error in deciding the merits of a defendant's fourth amendment claim.

Robinson v. Clarke, 939 F.2d 573, 575 (8th Cir. 1991); quoting *Lenza v. Wyrick*, 665 F.2d 804, 808 (9th Cir. 1981).

The record in this case is clear that petitioner was afforded, and took, a full and fair opportunity to litigate his Fourth Amendment claim in the state courts. Thus, to the extent that petitioner is requesting this court to review the state courts' conclusions regarding the substance of his Fourth Amendment claim, this court is barred by *Stone* from doing so.

However, petitioner also argues that the state appellate courts misapplied the harmless error doctrine after finding a Fourth Amendment violation, and relies upon *Brecht v. Abrahamson*, 507 U.S. 619 (1993) for the proposition that an evidentiary hearing and particularized findings are necessary to determine whether the state met its burden of showing harmlessness. Respondent argues that the first of petitioner's claims is barred by *Stone v. Powell* in its entirety.

The Eighth Circuit has not directly addressed the issue of whether habeas review of a state court's conclusion that a Fourth Amendment violation was harmless error is barred by *Stone v. Powell*. Neither petitioner nor respondent has briefed this issue.

The Third Circuit, in *Gilmore v. Marks*, 799 F.2d 51 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1041 (1987), thoroughly addressed this issue and concluded that the state

court's finding of harmlessness was a part of the "full and fair" opportunity to litigate the underlying Fourth Amendment claim, and was thus barred by *Stone*. The court noted that in the two cases before the Supreme Court in *Stone*, one of them (Powell) involved a state court's finding that any Fourth Amendment violation was harmless, and the other (Rice) involved a decision that the state court's ruling on the merits of the Fourth Amendment claim was incorrect. The Supreme Court did not distinguish between the two in its discussion of the deference to be accorded state courts' ruling on Fourth Amendment claims, leading the Third Circuit to conclude, "That the state appellate court in *Powell* had found the error, if any, to be harmless was, therefore, irrelevant to the Court's decision." 799 F.2d at 56. *Accord, see, Agee v. White*, 809 F.2d 1487, 1490 (11th Cir. 1987) (State court's finding of harmlessness was part of "full and fair" opportunity to litigate Fourth Amendment claim and therefore *Stone*-barred); *McDaniel v. Oklahoma*, 582 F.2d 1242, 1244 (10th Cir. 1978), *cert. denied*, 439 U.S. 969 (1978) (same).

In *Stone*, the Court found that Fourth Amendment claims were not cognizable in habeas proceedings, because the exclusionary rule was not a constitutional rule, but rather a judge-created rule of deterrence meant to prevent law enforcement officers from violating the amendment. Weighing the social costs of overturning state convictions based upon a non-constitutional doctrine, the Court concluded that where a state had provided a full and fair opportunity to a defendant to litigate his Fourth Amendment claim, the federal courts were powerless to intervene, even if they might disagree. Later, in explaining *Stone*, Justice Powell wrote:

> As many of our cases indicate, the admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict. We have held repeatedly that such evidence ordinarily is excluded only for deterrence reasons that have no relation to the fairness of the defendant's trial. *United States v. Leon*, 468 U.S. 897, 906, (1984); *Stone v. Powell*, 428 U.S., at 486-488; *United States v. Calandra*, 414 U.S. 338, 348 (1974). Indeed, it has long been clear that exclusion of illegally seized but wholly reliable evidence renders verdicts less fair and just, because it "deflects the truthfinding process and often frees the guilty." *Stone v. Powell*, 428 U.S., at 490. *See also id.*, at 540 (WHITE, J., dissenting) (noting that often "the only consequence" of exclusion "is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted"). Thus, the harm suffered by respondent in this case is not the denial of a fair and reliable adjudication of his guilt, but rather the absence of a windfall.

Kimmelman v. Morrison, 477 U.S. 365, 395-5 (1986) (Powell, J., Concurring).

I am confident that given this background, the Eighth Circuit would join the other circuits that have addressed the issue and conclude that *Stone* bars the habeas court from considering the state appellate courts's findings of harmlessness of a Fourth Amendment violation. Consequently, I conclude that petitioner's first claim is barred in its entirety.

Claim 2

Petitioner argues that the state courts misapplied federal law in holding that his proposed voice exemplar would waive his Fifth Amendment privilege against self incrimination and would subject him to cross examination, and also that the trial court's ruling was not prejudicial. In addressing this issue the Nebraska Supreme Court held, "We conclude that if relevant and reliable, a voice exemplar may be offered into evidence by a criminal defendant without waiving his or her Fifth Amendment privilege against self-incrimination." *State v. Newman*, 250 Neb. at 244. The court went on, however, to hold that even though the trial court had erred in excluding the voice exemplar, the ruling was not prejudicial because, under the test the court established, the petitioner had failed to demonstrate that the exemplar would meet the "relevant and reliable" test. *Id.*, at 245.[2] Petitioner seems to argue that the state supreme court's application of this rule to him was an unreasonable application of federal law under 28 U.S.C. § 2254(d)(1). I disagree.

The application of a state's evidence rules to a habeas petitioner has long been viewed by the federal courts as largely unreviewable in habeas corpus actions. *See*, e.g.,

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[2] Although the court used the term "irrelevant" in its conclusion, it had previously found that the evidence would have been relevant to the issue of identity. *Id.*, at 244. Its conclusion follows a discussion that an exemplar may be "relatively easy to feign," but is also explained that "the conditions under which petitioner spoke to the victim could not be reproduced." *Id.* at 245. In any event, it is clear that the court faulted the petitioner for failing to meet the "relevant and reliable" standard it established in this case.

Redding v. Minnesota, 881 F.2d 575, 578 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990):

> In a habeas corpus proceeding state evidentiary matters are reviewable only if "the asserted error infringed a specific constitutional protection or was so prejudicial as to deny due process." *Wallace v. Lockhart*, 701 F.2d 719, 724 (8th Cir.) *cert. denied*, 464 U.S. 934 (1983). A denial of due process occurs when the error is "gross, conspicuously prejudicial or of such import that the trial was fatally infected." *Rhodes v. Foster*, 682 F.2d 711, 714 (8th Cir. 1987) (citing *Maggitt v. Wyrick*, 533 F.2d 383, 385 (8th Cir.), *cert. denied*, 429 U.S. 898 (1976)). It follows that this due process standard requires a greater showing of prejudice than needed to support a finding of plain error on direct appeal. *Daniels v. Wood*, 819 F.2d 195, 197 (8th Cir.), *cert. denied*, 484 U.S. 861 (1987).

881 F.2d at 579. A habeas court may examine such alleged errors only if they are so egregious as to have "fatally infected the trial and rendered it fundamentally unfair." *Meadows v. Delo*, 99 F.3d 280, 283 (8th Cir. 1996), quoting *Troupe v. Groose*, 72 F.3d 75, 76 (8th Cir. 1995).

The Nebraska Supreme Court is the final arbiter of state law, including the Nebraska rules of evidence. Neither the rule as pronounced, nor the application of it to this petitioner, has been shown by him to meet the test above described. In fact, as that court stated, there was other identification evidence before the jury which clearly pointed to the petitioner; the use of his voice exemplar in addition to the "accent/no-accent" conflict among the

other witnesses would not likely have changed the outcome of the trial in any respect. Its exclusion certainly did not render the trial "fundamentally unfair." This claim is without merit.

Claim 3

The previous discussion regarding evidentiary rulings is applicable to this claim. Petitioner has argued that the use of the Nebraska evidence rules at issue, *Neb. Rev. Stat.* § 27-404(2) and § 27-403, were misapplied by the trial court in admitting the testimony of Russell Grady and Julie Denny. Section 27-404(2), itself, however, permits the use of such testimony as "proof of motive, *opportunity*, intent, preparation, plan, knowledge, *identity*, or absence of mistake or accident." (Emphasis added). Although the petitioner argues otherwise, it is clear that the evidence was relevant to both the perpetrator's identity[3] and his opportunity to commit the charged offense.

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[3] Although petitioner argues that his identity was never at issue in the trial, the Eighth Circuit has repeatedly held that a plea of not guilty to a criminal charge automatically places all issues related to the prosecution's burden of proof, including identity, at issue. *See*, e.g., *U.S. v. Miller*, 974 F.2d 953 (8th Cir. 1992):

> As we explained in *United States v. Gilmore*, 730 F.2d 550, 554 (8th Cir. 1984):
>
> > By pleading not guilty, the defendant put the government to its proof on all elements of the charged crime, including intent, knowledge, and identity. The challenged testimony supports the government's position on each of these issues. The government is not required to wait until a defendant posits a particular defense asserting the lack of one of the

Petitioner has not shown that its admission rendered the trial "fundamentally unfair" so as to qualify for habeas relief on this ground.

Claim 4

Petitioner's challenge to the victim's identification testimony raises Fourteenth Amendment issues. Petitioner claims that the photo array from which the victim identified his picture was unduly suggestive, and that the suggestiveness led to the victim's erroneous identification of him in court, denying him due process.

In reviewing whether a photo array was unduly suggestive, the court must determine, from the totality of the circumstances of the procedures used and the photos themselves, whether there was created a "very substantial likelihood of irreparable misidentification," *Simmons v. United States*, 390 U.S. 377 (1968), such that the procedure was fundamentally unfair to the defendant. *Manson v. Braithwaite*, 432 U.S. 98 (1977); *Dodd v. Nix*, 48 F.3d 1071 (8th Cir. 1995); *Harris v. Wyrick*, 644 F.2d 710, 712 (8th Cir. 1981). If so, then the court must also decide whether, in fact, the identification testimony at trial was reliable, in spite of the unduly suggestive identification

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elements of the charged crime, but may prove up their case in anticipation of such a defense. *See, also, Estelle v. McGuire*, 502 U.S. 62, 69-70 (1991) ("[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense").

974 F.2d at 960.

procedures. *Neil v. Biggers*, 409 U.S. 188 (1972); *Graham v. Solem*, 728 F.2d 1533, 1541 (8th Cir. 1984), considering

> the witness's opportunity to view the defendant at the time of the crime, the witness's degree of attention at the time of the crime, the accuracy of the witness's description prior to the identification, the level of certainty expressed by the witness when making the identification, and the length of time that has elapsed between the crime and the confrontation.

409 U.S. at 199-200.

The Nebraska Supreme Court found that the procedures used in this case regarding the photo array were not, in fact, unduly suggestive. 250 Neb. at 226-7. Although the petitioner disagrees, he has not shown that that court's conclusion was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The Nebraska Supreme Court's conclusion is fully supported by the record of the case and clearly follows established Supreme Court precedent.[4] I conclude, therefore, that this claim, too, is without merit.

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[4] The Nebraska Supreme Court relied upon *State v. Gibbs*, 238 Neb 268 (1991) and *State v. Price*, 229 Neb. 448 (1988), both of which applied the *Braithwaite* and *Biggers* analysis, albeit without citing to those cases. In those cases the Nebraska Supreme Court relied upon *State v. Swoopes*, 223 Neb. 914 (1986), overruled on other grounds, *State v. Jackson*, 225 Neb. 843 (1987), as authority for its standards in reviewing claims of unduly

Claim 5

Petitioner challenges the sufficiency of the evidence supporting conviction. Applying the familiar test of *Jackson v. Virginia*, 443 U.S. 307 (1979), it is clear from the record that the evidence was more than sufficient to support a guilty verdict by "any rational trier of fact." 443 U.S. at 319. The Nebraska Supreme Court's consideration of the issue is clearly within the parameters of the precedents of the United States Supreme Court. 28 U.S.C. § 2254(d). This claim is likewise without merit.

IT THEREFORE HEREBY IS RECOMMENDED to the Hon. Warren K. Urbom, United States Senior District Judge, pursuant to 28 U.S.C. § 636(b)(1)(B), that the Amended Petition for Writ of Habeas Corpus be denied in all respects.

The parties are notified that failure to file an objection to this recommendation in accordance with the local rules of this court may be held to be a waiver of any right to appeal the district judge's adoption of this recommendation.

Dated March 25, 1998

BY THE COURT:

/s/ David L. Piester
United States Magistrate Judge

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suggestive identification techniques. *Swoopes*, in turn, relied upon *Simmons v. United States, supra.*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN BYRON NEWMAN, Plaintiff, vs. FRANK X. HOPKINS, Defendant.	) 4:96CV3287)) MEMORANDUM AND) ORDER ON AMENDED) PETITION FOR HABEAS) CORPUS)) (Filed Apr. 27, 1998)

On March 26, 1998, there was filed a Report and Recommendation of United States Magistrate Judge David L. Piester that the petitioner's Amended Petition for Writ of Habeas Corpus be denied in all respects. Filing 21. Objection to that report and recommendation was made by the petitioner on April 9, 1998. The respondent moved to strike the petitioner's objection. The petitioner moved to strike the respondent's motion to strike. The respondent then moved to strike the petitioner's motion to strike. The petitioner filed a second motion to strike the respondent's motion to strike.

I must move quickly to resolve these motions, lest the giddiness of this merry-go-round becomes an addiction.

The report and recommendation of the magistrate judge was filed and copies mailed to counsel on March 26, 1998. The objection to the report and recommendation was filed and served by mail on April 9, 1998, the fourteenth day after March 26. The question is whether the objection was timely made. That depends upon the interrelatedness of three sets of rules: the Federal Rules of Civil Procedure, the Rules Governing Section 2254 Cases

in the United States District Courts, 28 U.S.C. § 636(b)(1)(C), and the Local Rules of this court (NELR).

Because this is a case filed under 28 U.S.C. § 2254, it seems sensible to begin with the Rules Governing Section 2254 Cases in the United States District Courts. They became effective February 1, 1977. Rule 8 of those rules allows a magistrate judge to be designated to submit recommendations for disposition and says that any party may serve and file written objections to the recommendations "[w]ithin ten days after being served with a copy." Title 28, U.S.C. § 636, having to do with a magistrate judge's procedures, uses the same language. No other provision of those rules or of § 636 explains how to calculate the ten-day period. The ten-day limit could be expanded beyond ten days if Rule 6 of the Federal Rules of Civil Procedure were to apply to § 2254 cases, because that rule does explain how to compute time, by not including the first day, including the last day unless it is a Saturday, a Sunday, or a legal holiday or when the court is inaccessible for the filing, and excluding Saturdays, Sundays, and legal holidays if the time prescribed is less than eleven days, and adding three days after service by mail. Whether any of the features of Rule 6 of the Federal Rules of Civil Procedure can be employed in the computation of times for § 2254 cases is therefore critical in this case.

The only rule of the Rules Governing Section 2254 Cases in the United States District Courts that suggests when the Federal Rules of Civil Procedure are applicable is Rule 11, which says:

> "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to, petitions filed under these rules."

Rule 81(a)(2) of the Federal Rules of Civil Procedure says:

> "These rules are applicable to . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. . . . "

In *Harris v. Nelson*, 394 U.S. 286 (1969), the court observed that, while habeas corpus proceedings are characterized as "civil," such a label is "gross and inexact." *Id.* at 293-94. "Essentially," the court said, a habeas corpus proceedings is "unique." *Id.* at 294. In deciding that the discovery provisions of the Federal Rules of Civil Procedure were not intended by the drafters to be extended to habeas corpus as a matter of right, the Court said:

> "In considering the intended application of the new rules to habeas corpus, it is illuminating to note that in 1938 the expansion of federal habeas corpus to its present scope was only in its early stages. . . . In these circumstances it is readily understandable that, as indicated by the language and the scanty contemporary exegesis of Rule 81(a)(2) which is available, the draftsmen of the rule did not contemplate that the discovery provisions of the rules would be applicable to habeas corpus proceedings."

Id. at 295.

One of the particular reasons the Supreme Court used in deciding that the discovery rules were not applicable to habeas corpus proceedings was that their specific provisions were "ill-suited to the special problems and character" of habeas corpus proceedings. That, however, does not appear to be true with respect to the matter of computation of time. No guidance for computing time is suggested in the Rules Governing Section 2254 Cases in the United States District Courts, other than its reference to the Federal Rules of Civil Procedure, "to the extent that they are not inconsistent with these rules . . . [and] when appropriate." It appears to me that Rule 6 of the Federal Rules of Civil Procedure is not inconsistent with the Rules Governing Section 2254 Cases in United States District Courts and that it is appropriate to apply that rule to habeas corpus cases, given the absence of guidance otherwise in computing time limits.

In *Harris v. Nelson, supra,* the court in footnote 7, said:

> "In fact, it is our view that the rule-making machinery [of district courts] should be invoked to formulate rules of practice with respect to federal habeas corpus and § 2255 proceedings, on a comprehensive basis and not merely one confined to discovery. The problems presented by these proceedings are materially different from those dealt with in the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure and reliance upon usage and the opaque language of Civil Rule 81(a)(2) is transparently inadequate. In our view the results of a meticulous formulation and adoption of special rules for federal habeas corpus and § 2255 proceedings would promise much benefit."

Consistent with the footnote in the *Harris* case, this court has adopted its local rules. NELR 72.4 provides:

> "A party may object to a recommendation entered by a magistrate judge in a dispositive matter (i.e., excepted by 28 U.S.C. § 636(b)(1)(A) and (2)) by filing a 'Statement of Objection to Magistrate Judge's Recommendation' within ten days after being served with a copy of the recommendation, unless a different time is established by order."

That local rule is not particularly helpful, because it, too, gives no guidance in how to compute the ten days or whether to exclude certain days or add days for mailing. My sense is that practicing lawyers have, by and large, assumed that Rule 6 of the Federal Rules of Civil Procedure applies to habeas corpus cases.

Accordingly, because the history of the intent of the drafters of the Federal Rules of Civil Procedure is scanty and murky, because habeas corpus proceedings have generally been characterized as civil in nature, because to apply Rule 6 of the Federal Rules of Civil Procedure to § 2254 cases would not be inconsistent with the rules specifically designed for those cases, I find that it is appropriate to apply Rule 6 to this case.

Supportive of this result is *Smith v. Housewright*, 66 F.2d 689, 694 (8th Cir. 1981).

It follows that, upon excluding Saturdays and Sundays, the objection to the magistrate judge's report and recommendation was timely filed on the tenth day after the filing and service of the report and recommendation.

None of the motions to strike will be granted. When I deny the first motion to strike, the other motions to strike have (and never have had) any purpose.

That brings us to the substance of the objection to the report and recommendation. The analysis by the magistrate judge of *Stone v. Powell* regarding the Fourth Amendment, the proposed voice exemplar and the Fifth Amendment, the admission of evidence of other crimes and acts, the photo array and the sufficiency of the evidence is on target. The recommendation of the magistrate judge will be adopted.

IT IS ORDERED that:

1. the Motion to Strike Objections of Petitioner to Magistrate's Report and Recommendation, filing 23, is denied;

2. the Motion to Strike Respondent's Motion to Strike, filing 24, is denied;

3. the Motion of Respondent to Strike Petitioner's Motion to Strike Objections of Petitioner to Magistrate's Report and Recommendation, filing 25, is denied;

4. the Second Motion to Strike Respondent's Motion to Strike, filing 26, is denied;

5. the Report and Recommendation of the magistrate judge, filing 21, is adopted; and

6. the Amended Petition for Writ of Habeas Corpus, filing 10, is denied.

Dated April 24, 1998.

BY THE COURT

/s/ Karren K. Urbom
United States Senior District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN BYRON NEWMAN, Plaintiff,	)	4:96CV3287
vs.	)	JUDGMENT
FRANK X. HOPKINS, Defendant.	)	(Filed Apr. 27, 1998)

In accordance with the Memorandum and Order on Amended Petition for Habeas Corpus,

IT IS ORDERED that judgment is entered for the respondent.

Dated April 24, 1998.

BY THE COURT

/s/ Karren K. Urbom
United States Senior District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN BYRON NEWMAN, Plaintiff, vs. FRANK X. HOPKINS, Defendant.	)	4:96CV3287 ORDER ON MOTION FOR CERTIFICATE OF APPEALABILITY (Filed May 29, 1998)

Upon review of my Memorandum and Order on Amended Petition for Habeas Corpus, filing 27, and the Report and Recommendation of Magistrate Judge David L. Piester, dated March 25, 1998, filing 21, I find that the applicant has not made a substantial showing of a denial of any constitutional right. Accordingly, in compliance with 28 U.S.C. § 2253(c)(2) a certificate of appealability shall not be issued unless done by a circuit justice.

Dated May 28, 1998.

BY THE COURT

/s/ Karren K. Urbom
United States Senior District Judge

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

98-2445

John Byron Newman,	*	
	*	
Appellant,	*	Appeal from the United
	*	States District Court for the
v.	*	District of Nebraska
	*	
Frank X. Hopkins,	*	
	*	
Appellee.	*	

The application for certificate of appealability is granted with respect to the following two issues: (1) whether the admission at petitioner's trial of evidence obtained in violation of the Fourth Amendment was harmless error; and (2) whether the refusal to allow petitioner to offer into evidence an exemplar of his own voice was a denial of any right under the Constitution of the United States.

In all other respects, the application for certificate of appealability is denied.

September 9, 1998

Order entered at the direction of the Court:

/s/ Michael Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2445NEL

John Byron Newman,	*	
	*	
Appellant,	*	Appeal from the United
vs.	*	States District Court for the
	*	District of Nebraska
Frank X. Hopkins,	*	
	*	
Appellee.	*	

Appellee's motion to recall the mandate has been considered by the court and is granted pending the filing of a petition for writ of certiorari.

(5231-010199)

December 17, 1999

Order entered at the direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2445NEL

John Byron Newman, Appellant, vs. Frank X. Hopkins, Appellee.	* * * * * * * *	Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge Bowman and Judge Loken would grant the petition. Judge Beam would grant the petition limited to the standard for harmless error review in federal habeas proceedings. The petition for rehearing by the panel is also denied.

(5128-010199)

November 22, 1999

Order entered at the direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

ORIGINAL

Supreme Court, U.S.
FILED
MAR 24 2000
CLERK

NO. 99-1401

IN THE SUPREME COURT OF THE UNITED STATES

FRANK X. HOPKINS, Warden
of the Nebraska State Penitentiary, *Petitioner*,

v.

JOHN BYRON NEWMAN, *Respondent*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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II. BECAUSE THE COURT OF APPEALS' APPLICATION OF THE CHAPMAN V. CALIFORNIA HARMLESS ERROR STANDARD RATHER THAN THE BRECHT V. ABRAHAMSON STANDARD WAS NOT ERRONEOUS, AND BECAUSE THE USE OF BRECHT WOULD NOT ALTER THE RESULT IN NEWMAN'S CASE, NO REASON EXISTS FOR THE GRANT OF CERTIORARI. 7

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NO. 99-1401

IN THE SUPREME COURT OF THE UNITED STATES

FRANK X. HOPKINS, Warden
of the Nebraska State Penitentiary,
Petitioner,

v.

JOHN BYRON NEWMAN,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, John Byron Newman, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion in this case. That opinion is reported as Newman v. Hopkins, 192 F.3d 1132 (8th Cir. 1999).

STATEMENT OF THE CASE

This habeas corpus action alleges constitutional violations arising during John Newman's second trial for sexual assault. Newman s first trial for the offense resulted in a mistrial because of a deadlocked jury.

With a few exceptions, the evidence against Newman was the same at both trials. Not surprisingly, the state's case rested primarily on the testimony of the victim of the sexual assault. In the early morning hours of March 21, 1993, after the victim had been asleep for several hours, she was awakened by a knock at the door. When she opened

the door, an assailant forced his way into the dimly-lit apartment. He sexually assaulted her there, making sure during the majority of the attack that her face was covered.

The victim promptly reported the incident to the police. She described her attacker as an Hispanic male, about 5'6" to 5'8" tall, with dark hair, an olive complexion, and a moustache. She stated that her assailant was wearing a white t-shirt, black pants, a black leather jacket, and white tennis shoes. She also told the police that her assailant had spoken with an Hispanic accent.

Just after the attack, police officers showed the victim photographic lineups of potential suspects, but the victim did not recognize her assailant in the initial displays. However, four days after the assault, the police showed the victim a third set of photographs. From these photographs, the victim identified John Newman as her assailant.

In addition to the victim's identification, the state offered the testimony of Julie Denny and Russell Grady, each of whom testified to seeing Newman within several hours of the assault wearing a black leather jacket. A black leather jacket unconstitutionally seized from Newman was also admitted at this second trial.[1]

Newman's defense, in turn, was that of mistaken identity. The assailant's purported Hispanic accent played a significant role in that defense. The man Julie Denny had seen on the night of the assault did not speak with any type of accent. Moreover, Newman presented the testimony of the Reverend Stewart Fimhaber, who stated that he had eaten

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[1] On direct appeal, the Nebraska Supreme Court held that the jacket was unconstitutionally seized, but that its admission into evidence at trial was harmless beyond a reasonable doubt. State v. Newman, 548 N.W.2d 739, 749 (Neb. 1996). The Eighth Circuit declined to disturb this ruling in the appeal of Newman's habeas action.

dinner with Newman early in March of 1993, and that Newman did not speak with an Hispanic accent. However, when Newman attempted to introduce a voice exemplar as evidence that he did not speak with an Hispanic accent, his efforts were thwarted. The trial court ruled that Newman could say anything he wanted to say, but that doing so would waive his Fifth Amendment privilege against self-incrimination and would subject him to cross-examination by the state. Based upon the trial court's ruling, Newman did not give the voice exemplar. Newman was then convicted, and sentenced to a term of twenty-five to fifty years imprisonment, with no possibility of parole.

Newman appealed his conviction through the Nebraska appellate courts. Among other arguments, Newman alleged that his due process rights were violated when the trial court ruled that he could not provide a voice exemplar to the jury without waiving his Fifth Amendment privilege against self incrimination. The Nebraska Supreme Court rejected all of Newman's claims of error. With respect to the voice exemplar, the court agreed that Newman would not waive his Fifth Amendment privilege by offering a voice exemplar. However, it determined that an exemplar can nevertheless be excluded if it possesses insufficient relevance or reliability. Newman, 548 N.W.2d at 751-52. The Nebraska Supreme Court held that, because of the ease with which a voice exemplar may be feigned and the lack of evidence from Newman establishing the genuineness of the exemplar, the evidence would have been properly excluded by the trial court regardless of its erroneous constitutional conclusions. Id. at 752.

After Newman's conviction was affirmed, he filed a petition for a writ of habeas corpus in which he reasserted the claim relating to the voice exemplar. Employing the amended habeas standards set forth in the Antiterrorism and Effective Death Penalty Act

of 1996 (hereinafter "AEDPA"), the district court concluded that Newman was not entitled to relief. However, the Eighth Circuit reversed. Newman v. Hopkins, 192 F.3d 1132 (8th Cir. 1999). From this Court's cases interpreting the due process rights of an accused, the Court of Appeals discerned that a defendant is entitled "to introduce a voice exemplar without waiving his Fifth Amendment privilege against self-incrimination." Id. at 1135. The Court of Appeals then held that the Nebraska Supreme Court's failure to remedy the denial of Newman's due process rights resulted in an outcome that "cannot reasonably be justified under existing Supreme Court precedent." Id. at 1136.

The Eighth Circuit rejected the State's argument that the Nebraska Supreme Court's decision not to correct the constitutional error rested on a state evidentiary rule requiring reliability. According to the Court of Appeals,

> [W]e read the Nebraska Supreme Court's statement that "the conditions under which Newman spoke to the victim could not be reproduced" as a *per se* rule of exclusion akin to that which the United States Supreme Court has held infringes impermissibly upon a defendant's right to testify on his own behalf.

Id. Finally, applying the harmless error standard set forth in Chapman v. California, 386 U.S. 18 (1967), the Eighth Circuit concluded that the constitutional error could not be deemed harmless. Given that the Hispanic accent was "an important factor in determining whether [Newman] fit the description of the attacker," and in light of the fact that Newman's first trial ended in a mistrial, the Court held that the exclusion of the voice exemplar was not harmless beyond a reasonable doubt. Id. at 1137.

ARGUMENT

I. BECAUSE THE COURT OF APPEALS' CONSTRUCTION OF "CLEARLY ESTABLISHED FEDERAL LAW" IS CONSISTENT WITH THE LANGUAGE AND

INTENT OF 28 U.S.C. § 2254(d)(1), AND BECAUSE A WRIT OF HABEAS CORPUS IS JUSTIFIED UNDER ANY RATIONAL INTERPRETATION OF § 2254(d)(1), THE DECISION DOES NOT WARRANT CORRECTION BY THIS COURT.

The State of Nebraska devotes much of its petition for a writ of certiorari to parsing the recently-amended language of § 2254(d)(1), which authorizes a writ of habeas corpus when a state decision is "contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court." According to the State, this language suggests that the "contrary to" rule may apply to some issues, while the "unreasonable application of" analysis is reserved for others. The State then discusses at length the differing approaches that the federal circuit courts have developed for applying the new habeas standards.

Many of these points undoubtedly sound familiar. Indeed, these very observations were made by the petitioners in Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998), and this very issue is already before the Court through a writ granted in that case on April 5, 1999. Williams v. Taylor, 119 S. Ct. 1355 (1999). Therefore, to the extent there is confusion in the circuits regarding how to apply the new AEDPA standards, that confusion will soon be resolved. In the meantime, however, there is no reason to delay denial of the petition in this case. Under any plausible interpretation of § 2254(d)(1), Newman is entitled to a writ of habeas corpus.

The right to introduce a voice exemplar without waiving the privilege against self-incrimination could not be more "clearly established." The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. AMEND. V. However, it is now well settled that

simply compelling a defendant to speak does not automatically violate this privilege. Instead, the Fifth Amendment privilege against self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." Schmerber v. California, 384 U.S. 757, 761 (1996) (emphasis added).

Consistent with this interpretation, the Court has held that compelled production of a voice exemplar generally does not violate a defendant's Fifth Amendment privilege. United States v. Dionisio, 410 U.S. 1, 7 (1973). A typical voice exemplar does not require a defendant to utter statements of a testimonial nature, but merely compels use of the voice "as an identifying physical characteristic." United States v. Wade, 388 U.S. 218, 222-23 (1967). Therefore, just as the privilege does not protect against "compulsion to submit to fingerprinting, photography, or measurements," it does not protect against compulsion of a voice sample. Id.

As a matter of Due Process, these same principles apply whenever a defendant wishes to offer a voice exemplar on his own behalf. Wardius v. Oregon, 412 U.S. 470, 474 (1973). Because of the exemplar's nontestimonial nature, the defendant should be allowed to submit the exemplar without waiving his right against self incrimination or subjecting himself to cross examination. Any other rule would interfere with the concept of reciprocity which the Supreme Court has found to be firmly embedded in the Due Process Clause. Id. at 274 & n. 6 (noting its consistent disapproval with "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to present a defense"). In addition, a rule against the submission of a voice exemplar by a defendant would unconstitutionally obstruct a

defendant's Due Process right to "present the defendant's version of the facts . . . to the jury so that they may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19 (1967); see also United States v. Nixon, 418 U.S. 683, 709 (1974) ("[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.")

Relying on the opinions in Dionisio, Wade, and Wardius, the Eighth Circuit has correctly defined the right to submit a voice exemplar without sacrificing the Fifth Amendment privilege against self-incrimination. The fact that the Court of Appeals "blended" Supreme Court cases to discern this right makes it no less "clearly established." The circuits addressing this question agree that the manner in which the right is "clearly established" affects only whether the "contrary to" or "unreasonable application of" standard of § 2254(d)(1) applies on habeas review. See, e.g., Matteo v. Superintendent, 171 F.3d 877 (3d Cir. 1999)(*en banc*)(discussing circuit interpretations of § 2254(d)(1)). Because the Nebraska Supreme Court's denial of the right to submit the voice exemplar is *both* "contrary to" and "an unreasonable application of" this Supreme Court precedent, a writ of habeas corpus must issue under any rational reading of § 2254(d)(1). Accordingly, the petition for a writ of habeas corpus should be denied.

II. BECAUSE THE COURT OF APPEALS' APPLICATION OF THE CHAPMAN V. CALIFORNIA HARMLESS ERROR STANDARD RATHER THAN THE BRECHT V. ABRAHAMSON STANDARD WAS NOT ERRONEOUS, AND BECAUSE THE USE OF BRECHT WOULD NOT ALTER THE RESULT IN NEWMAN'S CASE, NO REASON EXISTS FOR THE GRANT OF CERTIORARI.

The Court should likewise resist the call to review the Eighth Circuit's harmless error review in this case. The Eighth Circuit's policy of applying Chapman v. California to

constitutional violations which have not received a harmless error analysis in the state courts is entirely consistent with this Court's precedent. Moreover, the error would be considered harmful even under the standard announced in Brecht v. Abrahamson, 507 U.S. 619 (1993).

In the petition for a writ of certiorari, the State contends that the Supreme Court has developed two harmless error standards for non-structural trial errors: the Chapman standard for cases on direct appeal, and the test set forth in Brecht for cases on collateral review. In fact, however, the Supreme Court's divisions fall along different lines. As the Eighth Circuit correctly recognized in Orndorff v. Lockhart, 998 F.2d 1426 (8th Cir. 1993), the question of whether Brecht or Chapman applies depends upon whether the constitutional error received a Chapman harmless error review before the case reached the federal courts on a habeas petition.

The genesis for this dichotomy can be found in the Supreme Court's opinion in Brecht. In Br cht, the petitioner claimed that the state's references during trial to his post-Miranda silence violated his right to due process. The state appellate courts agreed that Brecht's rights had been violated. However, Brecht was denied relief when the Wisconsin Supreme Court determined, in accordance with Chapman, that the error was "harmless beyond a reasonable doubt." 507 U.S. at 626. Thereafter, Brecht filed a habeas petition under 28 U.S.C. § 2254, reasserting his due process claim. When his claim reached the Supreme Court, however, the sole issue for debate was whether the federal courts were obligated, as the State had been, to consider the effect of the due process violation under Chapman. Id. at 622-23.

The Supreme Court concluded that Brecht's case should be resolved with a view toward the principles underlying habeas relief. Id. at 632. The Court noted that a petition for a writ of habeas corpus ordinarily follows a direct appeal in the state courts. Id. at 633. Because of the thoroughness of that process, a presumption of finality and legality attaches to a petitioner's conviction and sentence after direct review. The writ of habeas corpus provides a limited avenue for overcoming that presumption, and is reserved for those petitioners who have been grievously wronged. Id. at 634. Absent such circumstances, a federal habeas court must respect the state court's good-faith efforts to honor constitutional rights. Id. at 634-35.

Consistent with these principles, the Supreme Court decided that Brecht was not entitled to yet another Chapman review in his case. According to the Court, "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that Chapman requires state courts to engage in on direct review." Id. at 636. Such a decision would result in duplication and undermine the States' interest in the finality of its decisions. Therefore, "[a]bsent affirmative evidence that state-court judges are ignoring their oath," a less onerous harmless error analysis is appropriate on habeas review. Id.

The Eighth Circuit's decision in Orndorff follows Brecht's reasoning to its only logical conclusion. Because the Supreme Court's opinion in Brecht was based on respecting the finality and integrity of state court decisions, it follows that Brecht does not apply if the state court has never *achieved* finality on the question of harmless error. Orndorff, 998 F.2d at 1430. In those instances, Orndorff does nothing more than ensure that, at some point in

the progression of the case, a constitutional error receives the harmless error review the Court in Chapman proscribed. Chapman, 386 U.S. 218, 24 (1967).

The State attempts to undermine this logic by pointing out in its petition that other circuits have rejected Orndorff. It also claims that undertaking a Chapman review in cases such as Newman's strips Brecht of its significance. None of these arguments, however, warrant this Court's attention. While the Eighth Circuit may be in the minority in applying Chapman, the other circuits' failure to recognize the true meaning of Brecht is no reason for this Court to retreat from its own principles in that case. Moreover, the State has obviously overstated Orndorff's significance. In reality, the role of Brecht has already been diminished with the passage of the AEDPA. Under the AEDPA, the federal courts do not perform their own harmless error analysis so much as review the reasonableness of a state court's harmless error calculus. Nevers v. Killinger, 169 F.3d 352 (6th Cir. 1999).

In any event, there are many instances in which the distinction between the Brecht and Chapman does not make a difference, because the constitutional error is clearly harmless or clearly harmful under either standard. This case is a prime example of a case which requires reversal under either Brecht or Chapman. As the panel's decision recognizes, Newman's was an extremely close case. The first trial on this offense, in which the prosecutor introduced virtually the same evidence, ended in a mistrial when the jury could not reach a verdict. In such a case, almost any piece of evidence can tip the balance from innocence to guilt.

Nothing had more potential of influencing the jury than evidence bearing on the identity of the perpetrator of the crime. Because the main witnesses in the crime encountered the alleged attacker in the dark under circumstances particularly susceptible

to unreliable identification,[2] each detail of identification was important. The question of whether Newman has an Hispanic accent was therefore crucial to determining whether he fit the description of the attacker. Under these circumstances, the Court of Appeals was correct in concluding that the denial of Newman's right to present evidence on this point was not harmless beyond a reasonable doubt. Moreover, because of the exculpatory value of Newman's lack of an Hispanic accent, the constitutional violation could not have helped but have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

As this analysis demonstrates, the constitutional error in Newman's case was harmful under both Chapman and Brecht. Under these circumstances, the petition for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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By _____

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[2]As the facts set forth in this brief demonstrate, the attack occurred late at night in the victim's dimly-lit apartment, after she had been sleeping for hours. The victim testified that she was crying throughout the attack. Under these circumstances, anything that corroborated the victim's identification was crucial to a jury believing Newman was her attacker.

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